

OECD and the regulation on Business and Human Rights: an evaluation of the OECD Guidelines for Multinational Enterprises

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<p>Tiivistelmä - Referat – Abstract</p> <p>The globalisation has positively affected the global economy, trade and labour possibilities. It has also caused a change in the global governance, where the sovereign states are no longer the sole actors in the field of international law. However, the international law has not evolved in the same pace as the world. In the power play with the States are international organisations and private entities such as corporations, sometimes larger in resources than of the States where they operate.</p> <p>The research question of the thesis is: <i>“How does the OECD regulate business and human rights?”</i> The aim of this thesis is to examine the OECD Guidelines on multinational enterprises and human rights and the emerging role of the organization in global governance as a standard setter. The thesis will not only discuss the guidelines as a recommendation from the OECD, but also the normative power OECD's soft law initiatives and national policy assessments have in national policy-making.</p> <p>The research was conducted by analysing relevant legal documents and literature.</p> <p>The result of this research is that multinational enterprise's responsibility to protect human rights cannot be sufficiently answered through traditional international law. The better option to provide protection for individuals is through binding treaty or soft law initiatives. At the moment the most potential tool for regulating corporate conduct are the OECD Guidelines for Multinational Enterprises.</p> <p>In order for the Guidelines to ensure effective protection, some amendments would be required. The Guidelines and the National Contact Points (NCP) are a weak authority and they are voluntary by their nature. The conclusion of this research project is that in order to make the Guidelines more effective the governments adhering to them would have to engage more in the implementation process, e.g. taking part in peer review processes, promoting the Guidelines, strengthening their NCPs and imposing material sanctions to the enterprises failing to cooperate.</p>			
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Contents

BIBLIOGRAPHY	II
1 INTRODUCTION	1
2 HUMAN RIGHTS AND MULTINATIONAL ENTERPRISES	7
2.1 Changing roles in international law	7
2.2 States as the primary subjects of international law	9
2.2.1 Extraterritoriality of State duties	11
2.3 Multinational Enterprises	14
2.3.1 Introduction	14
2.3.2 The role of multinational enterprises in international law	15
2.3.3 Multinational Enterprises and Human Rights	18
2.4 Concluding remarks	23
3 OECD AND GLOBAL GOVERNANCE	25
3.1 Introduction	25
3.2 OECD as an International organisation	26
3.3 The authoritative power of the OECD	32
3.3.1 Governance through identity	32
3.3.2 Governance through knowledge-production	35
3.3.3 Authority of the OECD – an example: The PISA	38
3.4 Concluding remarks	41
4 OECD AND THE REGULATORY FRAMEWORK ON HUMAN RIGHTS	43
4.1 OECD Guidelines for Multinational Enterprises	43
4.1.1 Background	43
4.1.2 OECD guidelines today	45
4.2 The National Contact Points	47
4.2.1 Introduction	47
4.2.2 Issues with the structure of the NCP system	49
4.2.3 Specific instances in the NCP	50
4.3 The impact of the Guidelines and the NCPs on Human Rights protection	56
4.4 How to improve the effectiveness of the OECD Guidelines?	58
4.4.1 Peer reviews and awareness raising	58
4.4.2 Effective cooperation and sanctions on non-compliance	61
5 CONCLUSIONS	63

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Abbreviations

ILO	International Labour Organisation
ICJ	International Court of Justice
ICC	International Criminal Court
NCP	National Contact Point
OECD	Organisation for Economic Cooperation and Development
UN	United Nations

1 Introduction

“The root cause of the business and human rights predicament today lies in the governance gaps created by globalization - between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge.”¹

In the international legal order the phenomenon most descriptive of the contemporary is the economic globalisation. When it is discussed in the context of Human Rights issues globalisation often comes across as a product of the western capitalism benefiting the rich and making the poor even more poor.² On the other hand, economic globalisation has played a large role in creating new jobs and technology enhancing human life. In the wake of economic globalisation, multinational corporations have increased in size, resources and capital, and some are perceived to have more global power than some nation States in which they operate.³

Multinational Enterprises can potentially generate growth, employment and skills in the state they operate. Despite this, if an enterprise fails to act responsibly, it is in a risk of contributing to adverse human rights, labour and environmental impacts.⁴ This brings up the question of the status of multinational corporations in the field of international law. International law has traditionally been recognized as law between sovereign States, giving only limited amount of rights and duties to private individuals. It now seems that there is a need for establishing an international regulatory framework for corporate

¹ John Ruggie, ‘*Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business entities*’ (2008) A/HRC/8/5 <<https://www.business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-report-7-Apr-2008.pdf>>, 3, accessed 16 September 2019

² Margot E Salomon, *Global responsibility for Human Rights – world poverty and the development of international law* (Oxford University Press 2007) 1

³ Celia Wells and Juanita Elias, ‘Catching the Conscience of the King: Corporate Players on the International Stage’ in Philip Alston (ed.), *Non-State Actors and Human Rights* (Oxford University Press 2005) 147

⁴ OECD, ‘What’s the issue?’ <<http://mneguidelines.oecd.org>> accessed 16 September 2019

conduct.⁵ The conclusion that stems from the contemporary research is clear: Due to the economic globalisation, international law has to find a way to reinvent itself in such a manner that the adequate amount of protection can be provided to individuals whether States, State agents or purely private entities, conduct the violations of their fundamental rights.

The first part of the thesis will examine *the role and the subjectivity of the multinational corporations in the international law*. The question of multinational enterprises' international legal subjectivity leads to the second question considered in this research: *Are multinational corporations obliged under international law to protect human rights of people affected by their operations conducted in foreign territory?* Private individuals already have horizontal responsibility to respect the human rights of other individuals under most of the Human Rights Conventions, e.g. the Universal Declaration on Human Rights and the European Convention on Human Rights. It is up to debate whether the responsibility to respect can be turned into a positive obligation that is mainly reserved to the State towards the people under its jurisdiction.

The issue of human rights violations by corporations has been scrutinized abundantly. For example, in its 2006 report, the United Nations (UN) Special Representative surveyed allegations of the worst cases of corporate-related human rights harm. They occurred, predictably, where governance challenges were the greatest: disproportionately in low income countries, in countries that often had just emerged from or still were in conflict and in countries where the rule of law was weak and levels of corruption high.⁶

For these host States, it is an economical risk to take actions against exploitative multinational corporations in order to protect labour standards and human rights as they can lose the foreign direct investment from the corporation. In the race-to-the-bottom multinational enterprises establish subsidiaries where it is good for their business. In their negotiations with the governments of host countries, their ability to "pick up and leave" serves them an advantage over States dependent on the multinational enterprise's investment.⁷ "The strategies for development by international financial institutions, e.g.

⁵ Menno T. Kamminga - Saman Zia-Zarifi, *Liability of Multinational Corporations under International Law*, (The Hague, Kluwer Law International 2000) 4

⁶ John Ruggie (n 1) 6

⁷ Celia Wells and Juanita Elias (n 3) 144

the International Monetary Fund (IMF) or the World Bank, together with programmes of deregulation and privatization, render States even less willing to frighten off enterprises.”⁸ The aspect of extraterritorial jurisdiction being an exception to the general principle of international law that the state only has jurisdiction over its own territory means that multinational enterprises can easily escape the jurisdiction of their registration state when operating in a host state as the acts committed belongs to the jurisdiction of the said state.⁹

Currently, there are few international legal sources that regulate business and human rights. It is within the jurisdiction of a state under which territory the violations of individual's rights have occurred to provide protection. The discussion on multinational enterprises and their social responsibilities, when operating internationally, emerged in the end half of the 20th century. The conversation on binding treaty on corporate social responsibility was initiated in the UN. This dialogue, however, did not lead to an agreement among its member States.

The soft law initiatives concerning corporate social responsibility emerged of in the 1970s. One of today's most influential initiatives was adopted by the Organisation for Economic Co-operation and Development (hereinafter the OECD) in 1976. The Guidelines for Multinational Enterprises (hereinafter the Guidelines)¹⁰ was a part of the Declaration for Foreign Investment and Multinational Enterprises and it is a cornerstone of this respective thesis.¹¹

The OECD is an international organisation consisting of 36 member States. The Convention on the Organisation for Economic Co-operation and Development was established in Paris in December 1960 (hereinafter the Paris Convention).¹² According to Article 1 of the Paris Convention the aims of the OECD are “to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development

⁸ Ibid

⁹ James Crawford, *'Brownlie's Principles of Public International Law'* (8th edition Oxford University Press 2012) 448

¹⁰ OECD Guidelines for Multinational Enterprises, OECD Publishing 2011

¹¹ OECD, OECD Declaration on International Investment and Multinational Enterprises, OECD Publishing 2011

¹² OECD, Convention on the Organisation for Economic Co-operation and Development, Paris 14 December 1960

of the world economy, to contribute to sound economic expansion in Member as well as non-member countries in the process of economic development and to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.”¹³ The broad scope of the OECD objectives means that it has the possibility to operate in various fields of economic policies nationally as well as internationally.

The Guidelines are recommendations which include principles and standards for responsible business conduct. They are directly addressed to multinational enterprises instead of member-States to the OECD even though it is the adhering States to the OECD that implement them in their national legal orders. The Guidelines have been reviewed several times, the most important reviews being the 2000 review and 2011 review. Originally the Guidelines only concerned multinational enterprises from adhering States operating in member-States of the OECD. This was later changed and now the multinational enterprises from OECD-States are expected to operate in accordance with the Guidelines also in Non-Member States of the OECD.

The Guidelines have been chosen for this project because they are the only current legal instrument covering business and human rights with a working monitoring method. Each adhering state to the Guidelines is obliged to set up a National Contact Point in their territory to handle specific instances against corporations operating abroad. The thesis will discuss the flaws and the positives of this mechanism and whether there could be room for improvement.

The work of the OECD is based on providing expert reports and rankings as well as guidance, agreements and recommendations to support the member States government’s work as legislators.¹⁴ Sometimes referred to as a think-tank or a rich countries club,¹⁵ the Organisation plays strongly on its good reputation among its members.¹⁶ The OECD mostly works through non-enforceable procedures and soft law initiatives. It is famous for its economic surveys and the Organisation has established probably the best-known

¹³ *ibid* Article 1

¹⁴ OECD, what we do and how <www.OECD.org/whatwedoandhow> accessed 6 March 2019

¹⁵ Richard Woodward, *The Organisation for Economic co-operation and development* (Routledge Global Institutions 2009) 1

¹⁶ J.C Sharman, ‘*Rationalist and Constructivist Perspectives on Reputation*’ 55 *Political Studies* 2007, 20, 30

global educational review system, PISA (Programme for International Student Assessment). The example of PISA, which is a ranking based on tests conducted on 15 years-old pupils of member States, illustrates that the soft means of the OECD can have real life implications on national level. The PISA ranking has had a major impact on the policies and debate about education in many of the state parties to the OECD. Despite its major significance, the effect PISA has had over the years is not based on any legislative force, as does not most of the OECD work either. Thus, it is evident that an organisation of experts, such as the OECD, may have an impact on legislators on national level without the advantage of legislative powers.

As presented, after studying the multinational corporations in international law, the thesis will examine the OECD regulation on multinational enterprises and human rights and the emerging role of the organization in global governance as a standard setter. The thesis will not only discuss the guidelines as a recommendation from the OECD, but also the normative power OECD's soft law initiatives and national policy assessments have in national policy-making. The aim of this thesis is specifically to examine and explain the Guidelines for Multinational Enterprises and discuss, whether or not they provide effective protection for individuals despite they are non-enforceable in member States.

This project examines the authority of the OECD in global governance and the methods it uses in its policy-making in order to influence its member States. This phenomenon is scrutinized for example with the help of governance theories, e.g. the epistemic governance theory. The research question of the thesis is: *"How does the OECD regulate business and human rights?"* The respective question has been selected because of a gap in judicial research, where the legislative role of the organization is not sufficiently studied.

Although, the thesis will discuss the specific question of OECD's regulatory framework on corporate social responsibility in Human Rights, it has to be acknowledged, that OECD is not the only international actor in this field. The Guiding Principles of the United Nations on Business and Human Rights¹⁷ and International Labour Organisation's (ILO) Tripartite Declaration of Principles concerning Multinational Enterprises and

¹⁷ The United Nations, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, 2011

Social Policy¹⁸ will be noted in the text, but because of the scope of this project they will be excluded from the thesis.

The thesis also excludes the national legislation of the adhering member States to the OECD Guidelines for Multinational Enterprises, as the study does not aim to be a comparative legal study, but rather a study researching the global policy-making of the OECD in the respective issue. The thesis will discuss the work of the OECD's monitoring body (National Contact Points) which has been implemented in each adhering state, but does not provide a case study related to the findings. Additionally, to legal and international instruments, companies often have their internal codes of conduct for responsible behaviour. These codes of conduct also need to be excluded from this project. These elements would make interesting topics for future research and for a broader research project on their relation to the regulatory framework of the OECD.

The thesis takes a following structure: the main question will be answered in the fourth chapter. Before being sufficiently able to answer the research question light has to be shed on the meanings of business and human rights. The second chapter of the thesis will discuss the connection between multinational enterprises¹⁹ and human rights issues. The third chapter will shed light on the nature of the OECD as an organization and its authority over the national policies. The fourth chapter will discuss the Guidelines and their efficacy in protecting human rights. Finally, I will provide my concluding remarks in the chapter 5.

The research will be conducted with doctrinal methodology using the OECD Guidelines for Multinational Enterprises and relevant legal texts as the main source for the thesis. The aim of this thesis is to build a comprehensive picture of OECD's regulatory framework on business and human rights. The aim is to understand and evaluate the effects OECD's work has had in the corporate Human Rights issues and whether the procedures put in place are adequate to guarantee that multinational enterprises in fact take into account the human rights of the people affected by their operations. The thesis will question the effectiveness of the regulatory framework and point out the areas that might need improving.

¹⁸ International Labour Organization (ILO), *ILO Declaration on Fundamental Principles and Rights at Work*, June 1988

¹⁹ Also referred as multinational corporations and transnational corporations.

2 Human Rights and Multinational Enterprises

2.1 Changing roles in international law

As the power relations of international order have been shifting in the 20th century, new actors have emerged due to multipolar post cold war status quo, and modern globalisation, the question of the role of non-governmental entities in international law has risen to a new level of significance. Some of the power and the responsibilities of the sovereign States has even been handed over to non-state actors due to privatization²⁰ These tasks formerly occupied by States are now run by enterprises and international organisations.

In *Reparations for injuries* the International Court of Justice (the ICJ) has recognized the UN's ability to bring claims into the ICJ and therefore it's limited personality in international law.²¹ As the UN is not a state, but has now been recognised by the ICJ to have these state-like qualities, it should theoretically be possible to admit that also other entities, such as enterprises could have restricted international legal personality under certain conditions. The international legal personality of enterprises is still under academic debate and this thesis will not be able to give a clear-cut answer on whether multinational enterprises are a subject of international law or not, but in the human rights scholarly it has been stated that enterprises are not completely excluded from having human rights responsibilities.²²

Even though the subjectivity of enterprises, multinational or not, in international law might be a question without an absolute answer, another question is yielded from the current state of affairs: *Can multinational enterprises, formally subjects of international law or not, have international human rights responsibilities?*

²⁰ Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006) 8

²¹ *Reparations for injuries*, Advisory Opinion, [1949] ICJ Rep 174. In the case concerning the reparation for injuries suffered in the service of the United Nations the ICJ considered that the United Nations is an entity possessing objective international personality, not only recognized by the Member States to the UN but also non-members.

²² See for example Andrew Clapham (n 20) and Philip Alston *Non-State Actors and Human Rights* (Oxford University Press 2005)

Most of the Human Rights Conventions, if not all, recognize that individuals have at least one responsibility towards other individuals in Human Rights law: the responsibility to respect the human rights of other individuals.²³ Even though the primary responsibility for protecting human rights belongs to States, the ever-globalized markets and powerful multinational enterprises have created a need for a more thorough international framework related to the issue of accountability and responsibility of Non-State Actors in ensuring that every individual can fully enjoy their respective human rights.

The question of Human Rights responsibilities of Multinational Enterprises has become even more urgent, as multinational enterprises operate in States other than the ones they were founded in, often in weak governance-zones. According to the OECD “Weak governance zones” are defined as investment environments in which governments cannot or will not assume their roles in protecting rights (including property rights), providing basic public services (e.g. social programmes, infrastructure development, law enforcement and prudential surveillance) and ensuring that public sector management is efficient and effective. These government failures lead to broader failures in political, economic and civic institutions that are referred to as weak governance.”²⁴ This governmental failure allows multinational enterprises to take advantage of such conditions.

Despite the fact that it is primarily the government’s task to establish a functional legal order, the situation where a private entity could conduct in acts that are against the international law is insufferable. The race to the bottom causes often numerous violations of human rights in the host state. These questionable operations can include “sweat shop conditions, indigenous peoples’ communities displaced without adequate consultations or compensation to make way for oil and gas company installations; foods and beverages firms found with seven-year-old children toiling on their plantations; security forces guarding mining-company operations accused of shooting and sometimes raping or killing trespassers and demonstrators; and internet service providers as well as

²³ See for example UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III) preamble: “.... every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction”

²⁴ OECD, *OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones* (OECD Publishing 2006) 11

information technology companies turning over user information to government agencies tracking political dissidents in order to imprison them.”²⁵

As the host government declines or is unable to address these types of issues it could be seen just that an entity of international status could challenge the status quo in the case in question. If this would be the case, then a corporation could be accounted for breaches of international human rights. The other potential mechanism could be that States of origin would exercise extraterritorial jurisdiction against corporations that conduct in wrongful acts in other countries.

This chapter will discuss the international legal subjectivity of States and generally of Non-State Actors, then setting the focus on Multinational Enterprises. Secondly this chapter will discuss the obligations of Multinational Enterprises generally in International Human Rights Law and whether or not Multinational Enterprises can be held internationally accountable for infringes of Human Rights of others. Last I will present concluding remarks.

2.2 States as the primary subjects of international law

Public international law, the law of nations, has its traditionally meaning as being the rules regulating the relations between States.²⁶ A subject of International law is “an entity of a type recognized by customary law as capable of possessing rights and duties and of bringing and of being subjected to international claims.”²⁷ Apart from the International Court of Justice’s decision *Reparation for injuries* where the Court recognised the UN as being capable of bringing claims in the International Court of Justice, the sovereign States are the main actors in public international law. Inside the terminology of a state there are different complexities on what counts as a state. The legal criteria of statehood is listed in Article 1 of the Montevideo Convention on Rights and Duties of States: “The State as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations

²⁵ John Ruggie, *‘Just Business – multinational corporations and human rights’* (New York and London W.W Norton & Company 2013) xv

²⁶ James Crawford (n 9) 4

²⁷ *ibid* 115

with other States.”²⁸ However, this thesis will discuss only the question of States in general compared to multinational enterprises.

Also in Human Rights law, the States are the main duty-bearers, as the human rights law itself has “traditionally been conceived as a set of norms and practices to protect individuals from threats by the state, attributing to the state the duty to secure the conditions necessary for people to live a life of dignity.”²⁹ Therefore, the Human Rights law, as apart from general public international law, which regulates relations between States, is law between a state and a private individual or a private entity, as also enterprises can be right-holders in international human rights law. Even though Human Rights law protects individuals against actions of a state, it is also a State’s responsibility to protect an individual’s human rights from other individual’s actions with appropriate legislation. For example, according to Article 1 of the European Convention on Human Rights the parties to the treaty (States) shall “secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”³⁰

As stated in the first article of the European Convention on Human Rights, the responsibility of a State to protect the individual from Human Rights violations concerns the individuals within the State’s jurisdiction. Under international law the state has jurisdiction over the population within its territory. International law also imposes a duty to the State to protect individuals within its jurisdiction from abuses of their human rights by non-state actors through legislation and policy-making.³¹ However, the State is not responsible for protecting individuals that are not within its territory. Hence, if a Non-State Actor violates an individual’s human rights, the only state responsible of protection is the State within which the violation occurs. This, however, has caused some debate by scholars stating, that if a State would have extraterritorial jurisdiction it could protect people that cannot be protected by their own government.³²

²⁸ Convention on Rights and Duties of States adopted by the Seventh International Conference of American States, 26 December 1933, 165 LNTS 19

²⁹ John Ruggie (n 25) 25

³⁰ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5

³¹ John Ruggie (n 25) 39

³² Robert McCorquodale and Penelope Simons, ‘Responsibility beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law’ (2007) 70 Mod L Rev, 598, 598

2.2.1 Extraterritoriality of State duties

It is possible under customary international law and under human rights law that a state is responsible for an act committed by someone else when the wrongful act can be attributed to the state.³³ According to the International Law Commission (ILC) a conduct of any state organ is considered as an act of a state whether the organ exercises legislative, executive, judicial or any other functions.³⁴ It also States that a private individual's act might be considered as an act of a state. This is the case when "the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."³⁵ Therefore, it is possible, that a corporation's acts outside of the national territory are attributed to the state, when the corporation uses governmental authority or when it functions on the instructions of, or under the direction or control of the State. However, when the corporations operate abroad they usually set up a subsidiary in the host state. This subsidiary body of the corporation is the national of the state that it was established in and under that state's jurisdiction.³⁶

There are international policy-domains where a national jurisdiction has extended to cross borders so that the state can ensure that non-state actors within their jurisdiction do not abuse recognized rights, for example antiterrorism, money-laundering and environmental protection. The extension to extraterritorial jurisdiction is very limited on the Human Right issues. Even though Human Rights treaties do not require States to use extraterritorial jurisdiction they are not prohibited to do so if there is a "recognised jurisdictional basis" such as where the actor or the victim of abuse is a national of the state that uses extraterritorial jurisdiction.³⁷

There is a major public interest in protecting every individual's human rights also from non-state actors and an apparent gap of responsibility where human rights violations occur, especially in weak governance zones, and no state offers protection or remedy to the victims, not even the state under which jurisdiction the violations occur. This is

³³ Robert McCorquodale and Penelope Simons (n 32) 601

³⁴ International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of its 53rd session, A/56/10, August 2001, UN GAOR Article 4

³⁵ Ibid Article 8

³⁶ Robert McCorquodale and Penelope Simons (n 32) 615

³⁷ John Ruggie (n 25) 39-44

especially due to the fact that multinational corporations tend to take their business into the countries of “weak governance zones” where manufacturing is more economical for the companies and where the rights of the individuals affected by the operations might not be the priority for the government. There is a need for resolving the issue, and it is possible that if the state duty to protect individuals from human rights violations would be extended to an extraterritorial responsibility to protect individuals.

However, the extraterritoriality of state duties is not coherent with the doctrine of the equality of States and the principle of non-intervention. The legal personality and the legal subjectivity of a state is directly linked to the idea of States being sovereign and equal. This means that a state has exclusive jurisdiction over its territory and the permanent population living on its territory and the duty of non-intervention in the territory of jurisdiction other sovereign States.³⁸ The principle has also been noted in *Lotus*, where the Court stated that “the first and foremost restriction imposed by international law upon a state is that – failing the exercise of a permissive rule to the contrary- it may not exercise its power in any form in the territory of another state.”³⁹ The States are all equal in judicial terms and a state should refrain from interfering with other state’s national affairs. It is therefore politically and diplomatically risky for a state to “meddle” into another state’s internal affairs. However, as Ruggie has noted, the whole system of international Human Rights Law is interfering with the classical view of non-intervention.⁴⁰

In the context of Human Rights Law, it is reasonable to ask whether it should be possible for another state to intervene in other States area of jurisdiction when a breach of an international obligation is taking place in said area. In some cases the jurisdiction to bring a claim can be universal and overcome the principle of non-intervention, as it was in *Barcelona Traction*.⁴¹ In the case the ICJ held that “When a State admits into its territory foreign investments or foreign nationals, whether national or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment afforded to them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the

³⁸ James Crawford (n 9) 448

³⁹ (*France v. Turkey*) (1927) *P.C.I.J., Ser. A, No. 10*

⁴⁰ John Ruggie (n 1) 7

⁴¹ *Barcelona Traction, Light and Power Company (Belgium v. Spain)* ICJ Reports, 5 February 1970

obligations of a State towards the international community as a whole, and those arising vis-a-vis another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.⁴² The *erga omnes* norms that derive from “the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.”⁴³ As the paragraph 33 of the judgement notes, in contemporary international law there can be State obligations towards international community as a whole, which creates a legal interest for all States in the protection of these *erga omnes* norms, i.e.g international human rights. Hence, as the ICJ has validated the concept of *erga omnes* norms, in principle it should be possible for all States to act against other States that infringe *erga omnes* obligations. Despite of this, the ICJ stand has not entered the world of “is” in international law due to continuing debate on the actual meaning of the ICJ clause.⁴⁴

Even if States would have an extraterritorial responsibility over the human rights violations committed by their national corporations the issues still arise when the corporation acting against human rights treaties is a large multinational corporations with strong ties to numerous States. It is complex to establish the state that would have the jurisdiction over the case. Another problem is that probably not many States would volunteer for using their jurisdiction extraterritorially to handle human rights grievances due to the massive amount of resources this would consume and the complexity of diplomatic relations with other States. Other practical reason for States not willing to adjudicate extraterritorially according to Ruggie is that “Home States of transnational firms may also be reluctant to regulate against overseas harm by these firms because the permissible scope of national regulation with extraterritorial effect remains poorly understood, or out of concern that those firms might lose investment opportunities or relocate their headquarters.”⁴⁵ It is also to be noted, that the governments of developed

⁴² *ibid* para 33

⁴³ *ibid* para 34

⁴⁴ CJ Tams, ‘*Enforcing Obligations Erga Omnes in International Law*’ (Cambridge University Press 2005)

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⁴⁵ John Ruggie (n 1) 6

nations usually hold as one of their primary foreign policy missions to improve their national corporations' possibilities to succeed in foreign markets.⁴⁶

One type of means to solve the questions of handling human rights grievances happening abroad is through binding international treaty or soft law mechanisms. To this day, however, a binding international legal instruments regulating business and human rights has not been established. For the time being, the best applicable tool to manage enterprises' human rights grievances is the OECD guidelines, which will be discussed further in this thesis.

2.3 Multinational Enterprises

2.3.1 Introduction

States have traditionally been counted as the sole duty-bearer for Human Rights. This assumption on the State responsibility has increasingly been questioned due to the fact that globalisation has made non-state actors such as international organisations and multinational enterprises as powerful or at least almost as powerful players in the international field as the States. Philip Alston has described the relationship between non-state actors and human rights regime as a "Not-a-Cat" Syndrome. According to Alston, all the actors in the international human rights regime that are not States are called Non-State Actors. This group of actors in the sphere of international law can consist of such international institutions as the World Bank and the International Monetary Fund and the actors that this thesis is especially interested in: transnational corporations.⁴⁷ Multinational Enterprises, which are the focus point of the thesis are a sub-category of Non-State actors. Due to this, I will not go further than mentioning some of the other Non-State actors.

Those Non-State Actors who have an undeniable power in the global economy have a denied role in international human rights law. This terminology to separate actors that are a State or not a State, according to Alston, marginalizes the non-state actors from the sphere of the most significant human rights challenges facing the global governance right

⁴⁶ Robert McCorquodale and Penelope Simons (n 32) 598

⁴⁷ Alston, Philip, 'The Not-a-Cat Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?', in Philip Alston (ed.), *Non-State Actors and Human Rights* (Oxford University Press 2005) 3

now.⁴⁸ It is apparent that the traditional divide into Non-State Actors and States where only the States are the real bearers of Human Rights obligations cannot sufficiently serve the Human Rights domain. There are examples on easily preventable Human Rights violations from the part of transnational corporations in host States, where a transnational corporation has been able to escape from consequences both on national and international level. One of these examples is the Rana Plaza collapse, where in 2013 a building meant for offices but used for garment factories collapsed killing approximately 1100 people in Bangladesh due to the poor labour conditions. According to news outlets, similar hazardous working conditions still put garment industry workers at risk.⁴⁹

What then can be done to a human rights violation conducted by a non-state actor? An enterprise is under an obligation to obey the national laws of the state under whose jurisdiction it operates. In principle, it would be this state's responsibility to protect the persons under its jurisdiction. However, this kind of protection seems to be more of an exception to the rule than a rule itself. Human Rights violations conducted by private entities appear in large amounts in the territory of a developing country or in a conflict zone, with weak governance and non-existing judicial remedies for persons suffering from violations caused by non-state actors.

2.3.2 The role of multinational enterprises in international law

In texts concerning corporations and human rights obligations, a multitude of terms are used to describe the corporation. Despite this there does not seem to be an universally accepted legal definition for a multinational enterprise.⁵⁰ According to the OECD Guidelines "multinational enterprises are companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, state or

⁴⁸ *ibid*

⁴⁹ Reuters, 'Five years after Rana Plaza disaster, many workers face 'unacceptably dangerous' conditions', 24 April 2018 < <https://www.reuters.com/article/us-bangladesh-garments-accident/five-years-after-rana-plaza-disaster-many-workers-face-unacceptably-dangerous-conditions-idUSKBN1HU301> > accessed 16 September 2019

⁵⁰ John Ruggie, 'Multinationals as global institution: Power, authority and relative autonomy' (2018) 12 Regulation & Governance 317, 318

mixed.”⁵¹ However, the Guidelines cover both enterprises operating abroad with international ties as well as purely national enterprises.

According to the Guidelines, in international law, the legal subjectivity of a corporation is a more contentious question. Especially after the beginning of economic globalisation, the number of corporations operating in more than one country has increased in resources and in power in the global trade. However, corporations are not subjects of international law the way that sovereign States are.⁵² This means that if corporations are not subjects of international law they cannot be accountable for breaking international laws. Usually it is the nation States’ responsibility to ensure that their national legislation is not violating international laws. As explored earlier, this is not always the case. When the state under which jurisdiction the corporation operates cannot or will not make sure that its legislation or the enforcement of the legislation is in accordance with international standards, in principle corporations cannot be held internationally liable either.

The discussion of the international legal status of the corporations can be found unfruitful and without a satisfactory answer. According to Andrew Clapham, the discussion should be moved away from the issue of subjectivity and focus on the capacity of the corporations. Private corporations can be held accountable under international law for such acts as genocide, torture and crimes against humanity.⁵³ According to the Rome Statute Article 25 the International Criminal Court (ICC) shall have jurisdiction over natural persons pursuant to the statute.⁵⁴ The crimes falling under the jurisdiction of the ICC do not, however, cover most of the undesirable corporate conduct by the multinationals as the ICC is supposed to handle the most heinous crimes committed. International corporations can be bound under the international law also through treaties. The OECD Anti-Bribery Convention⁵⁵ sets rules to nation States to punish corporations under their jurisdiction that violate the norms deriving from the Convention.

⁵¹ OECD, The Guidelines (n 10), Concepts and Principles, 17 para 4

⁵² James Crawford (n 9) 121

⁵³ Andrew Clapham (n 20) 29

⁵⁴ UN General Assembly, Rome Statute of the International Criminal Court, 17 July 1998, Treaty Series, vol. 2187, No. 38544

⁵⁵ OECD, OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Paris 21 November 1997

Clapham States that corporations have limited legal personality in international criminal law. Why could this not be the case with international human rights law?⁵⁶ According to Clapham, the resistance to recognise corporations' international legal personality "owes much to two fears. First is a fear that foreign corporations would somehow be able more easily to interfere in the political and economic affairs of States if they were acknowledged to possess a degree of international legal personality. Second is a fear that these foreign corporations would be able to trigger excessive diplomatic protection for national companies of the host state where the foreign nationals are controlling shareholders in those national companies."⁵⁷

Corporations can increasingly affect the human rights situations in host States. The idea that corporations cannot have international legal personality rises from the substance of the public international law; it is the range of international norms that regulate the legal relations between States. However, since large corporations have more and more power and resources in the global trade, even more than some sovereign States, the traditional view has been questioned. Corporations as private entities have certain rights under international law, as do private individuals, for example corporations are right-bearers of human rights. Corporations can, under their operations outside of their registration States' jurisdiction, severely affect the legal sphere of their host States.

International Human Rights law recognizes the rights of individuals and corporations against a state. According to James Crawford, to classify individuals as subjects of International Law is unhelpful, even though they in some ways have capacities in international law. Crawford therefore disagrees with Clapham, that a legal subjectivity of a private person could be built on the terminology of capacity and the State has the "monopoly of responsibility" in Human Rights. This monopoly is based on the fact that even though Human Rights instruments might state that individuals possess rights and duties under International Human Rights Law, there is no possibility to enforce these duties.⁵⁸

However, for example in the case of the OECD Anti-Bribery Convention, it is binding on the adhering States but it in fact creates obligations for private entities. According to

⁵⁶ Andrew Clapham (n 20) 77-78

⁵⁷ *ibid* 78

⁵⁸ James Crawford (n 9) 121

Article 1 of the Convention “Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.”⁵⁹ Hence, it is the State that has to produce legislation necessary to regulate its nationals to obey the Anti-Bribery Convention and the enterprise’s responsibility not to offer a bribe to a foreign officer. It would be therefore possible to produce similar enforceable legislation in the area of business and human rights. This does not mean that multinational enterprises would be counted fully as subjects of international law.

2.3.3 Multinational Enterprises and Human Rights

2.3.3.1 The Emerging corporate social responsibility

International Human Rights law protects individuals of infringements of their human rights from States. The arguments on why human rights obligations could not be extended from States to Multinational Enterprises are numerous. The often quoted phrase resisting the corporate social responsibility including Human Rights comes from Milton Friedman, according to whom the only social responsibility of business is to increase its profits.⁶⁰ Peter Muchlinski has listed some of the most used arguments against the corporate responsibility on human rights.⁶¹ It is the state’s and state’s only responsibility to legislate on matters of importance and for individuals to obey that law. In fact, enterprises can only be beneficiaries of human rights, not their protectors. It is also unclear which human rights the companies would have the responsibility to protect as it can only affect the limited amount of rights that it’s workers have, such as wage.

The most important argument against companies’ human rights responsibility in my view is that of the so-called “free rider problem.” The “free rider problem” means that not all of the states and enterprises are as interested in protecting human rights. The burden

⁵⁹ OECD, Anti-Bribery Convention (n 55) 7 Article 1 para 1

⁶⁰ Milton Friedman, ‘*The Social Responsibility of Business is to Increase its Profits*’ the New York Times Magazine 13 September 1970

⁶¹ Peter Muchlinski, ‘*Human Rights and multinationals: is there a problem?*’ in David Kinley (ed), Human Rights and Corporations, Series: International Library of Essays on Rights (2009 Ashgate Publishing) 36

would therefore be unevenly distributed between entities, where some enterprises and some states would take on much more to improve the human rights than others. This would lead into a “competitive disadvantage in relation to unscrupulous corporations” that do not take on similar responsibilities as others.⁶²

The free rider-argument can also be tied to the argument, according to which the corporate social responsibility would essentially mean that the human rights responsibilities would be “privatized” from States to multinational enterprises, “transferring to companies obligations that they believed belonged to States.”⁶³ The human rights responsibilities must remain as the primary responsibility of a state and the companies operating in that state have to be put into a role where they impact positively on the human rights situation of the state through using the best company conducts available. The amount of responsibility the company has on the human rights situation in an oppressive state admittedly is difficult to measure, which puts in importance that each company operating abroad has put up a corporate code of conduct on the best company policies to positively influence human rights and follow-up on that policy. In my view the state’s human rights responsibilities do not contradict the enterprises responsibility to refrain from actions that can have negative effects on individual rights.

Even though arguments against enterprise’s human rights responsibilities are logical, the calls for social responsibilities for enterprises are in fact due to the change in the economic world and are not unfounded. First, as Muchlinski states, the conception of a corporation has changed along with the corporation’s functions. Today, corporations are seen more as social organisations having social responsibilities towards their workers and others. Secondly Muchlinski notes that the call for corporate social responsibility is a wider political reaction to global economy and the “democracy deficit.”⁶⁴

Now there are moral expectations on corporation conduct from the public concerning human rights. The social costs for a corporation failing to comply with international human rights standards might be significant. A failure to respect human rights “can subject companies to the courts of public opinion - comprising employees, communities, consumers, civil society, as well as investors - and occasionally to charges in actual

⁶² *ibid*

⁶³ John Ruggie (n 25) xvii

⁶⁴ Peter Muchlinski (n 61) 36

courts.”⁶⁵ Sustainable development and corporate social responsibility has grown to be a more significant part of today’s world agenda and these ideas have increasingly reached the consumers. To conduct in accordance with corporate social responsibility and respecting human rights and is in the best interest of the corporation. The good will and the reputation of the corporation has a significant value in the 21st century. However, this does not provide any repartition to the individuals whose rights were violated by the corporation. The social costs and the “right thing to do”-thinking are a good addition to sway corporations to act according to Human Rights law, but it is not enough.

Even though the importance of sustainable development and the corporation’s role in it has increased its public interest, the idea of human rights and corporations’ interests can still be seen as contradictory to one another. According to Dinah Shelton “the dominant view among economists and policy makers in multilateral financial institutions appears to be that any hindrances to global trade and investment are bad for the development in general.”⁶⁶ Yet, the situation actually is the contrary because corporations can actually be very successful in the highly regulated environments such as Europe and North America⁶⁷ and the establishment of a rule of law is always good for both international trade and investment.⁶⁸ According to Olivier De Schutter “although studies by the OECD have demonstrated that stronger labour standards improve efficiency and lead to faster economic growth, and have not damaged the export performances of the countries having adopted them, it is considered nevertheless that the improvement of the core labour standards should result from a choice by the concerned State, rather than be imposed on it by threat of commercial sanctions.”⁶⁹

It has even been argued, that the political and civil rights could be put on stall and when the economic development has stabilized the economy of the development state, the social justice would follow. However, the economic, civil and political rights enjoy an status of being universal, interdependent and indivisible.⁷⁰ The only possibility therefore

⁶⁵ John Ruggie (n 1) 16

⁶⁶ Dinah Shelton, *‘Protecting Human Rights in a globalized world’*, in David Kinley (ed), *Human Rights and Corporations*, Series: International Library of Essays on Rights (Ashgate Publishing Ltd 2009) 207

⁶⁷ Celia Wells and Juanita Elias (n 7) 171

⁶⁸ Dinah Shelton (n 66) 207

⁶⁹ Olivier De Schutter, *‘Multinationals in European Law’*, in Philip Alston (n 7) 255

⁷⁰ Chris Avery, *‘Business and Human Rights in a time of change’*, in Menno T. Kamminga and Saman Zia-Zarifi (n 5) 22

is to try to establish a stable economy without disregarding the socio-economic justice of the individuals in the developing economy.

Nevertheless, there is a clear disadvantage in the relationship between large multinational enterprises and struggling developing countries benefitting the former. As the resources available for the enterprise can be larger than those of the state they operate in, it is possible for the multinational to dictate the rules of the business. According to Sarah Joseph “the economic muscle of MNEs may allow them to resist domestic sanctions” and even relocate to a more corporate-friendly environment.⁷¹ This, however, can have drastic consequences on the host states economy, which can lead to the host state not fulfilling its international responsibility to protect human rights.

2.3.3.2 How do corporations violate Human Rights?

When a corporation directly violates human rights responsibilities as an agent or under a direct control of a state, the state is responsible for the human rights infringement. According to International Law Commission the act of a non-state actor is attributable to the state if the private entity is “in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”⁷² Another question on corporate responsibility is that of the complex structural arrangements between corporate entities. The same way as States can operate through variety of different actions still being responsible for its agents, a company should be responsible for human rights infringements of its subsidiaries. The complex arrangements between companies has enabled corporations to hide behind their subsidiaries, for example a multinational enterprise can avoid any responsibility of its national sub-contractor.

The most common types of direct human rights infringements by corporations have to do with labour rights, such as right to equal pay for equal work, freedom of association and right to non-discrimination. Other types of human rights breaches that the company involves itself in can be for example right to life, liberty and security of the person, right to an adequate standard of living and right to self-determination.⁷³ However, enterprises can negatively impact on virtually the entire spectrum of internationally recognised

⁷¹ Sarah Joseph, *‘An Overview of the Human Rights Accountability of Multinational Enterprises’*, in Menno T. Kamminga and Saman Zia-Zarifi (n 5) 78

⁷² ILC (n 33) Article 8

⁷³ John Ruggie (n 1) 16

human rights⁷⁴ and therefore there is no need to specify the exact human rights that corporations should respect.

The developing states are dependent on the investments multinational enterprises bring to them and are therefore compelled to overlook corporate violations. This does not mean that the human rights would be protected in the host state hadn't it been for the enterprise. The States are perfectly capable to oppress their own. This however, can also be used as an advantage by enterprises. Companies can infringe human rights indirectly through state actions. This merely means that the company knowingly benefits from the state's human rights violations, for example benefitting from the state's use of forced and child labour.⁷⁵

Corporations can also infringe human rights in compliance with the home state's government.⁷⁶ This does not mean that the State wouldn't have the primary responsibility for oppressing individuals' rights under its jurisdiction. However, the company can play some role in the state's infringements, when its revenues help support this oppression.⁷⁷ Directly supporting government violating human rights includes an intention to participate in such acts, meaning that the company is aware of its assistance on the state's breach of international customary human rights principles. These actions can include for example assistance of forced relocation of people from the area of company's operation. The awareness of the compliance does not mean that the company has to wish for the state's actions to violate human rights.⁷⁸

All of the possible ways that companies can take part in negatively impact the lives of individuals of the state that they operate in can be reduced by the company's prevention on how to not negatively affect human rights. A company can best obey the requirement to respect human rights by conducting due diligence assessment on its actions. According to Ruggie this means "steps a company must take to become aware of, prevent and address adverse human rights impacts."⁷⁹ This requirement of due diligence assessment can be included in national legislations. However, international framework for due

⁷⁴ OECD Guidelines for multinational enterprises, commentary on the Human Rights chapter 32 para 40

⁷⁵ Andrew Clapham and Scott Jerbi, '*Categories of Corporate Complicity in Human Rights Abuses*' (2001) 24 Hastings Int'l & Comp.L. Rev. 339, 347

⁷⁶ John Ruggie (n 1) 20

⁷⁷ Andrew Clapham and Scott Jerbi (n 75) 340

⁷⁸ *ibid* 342

⁷⁹ John Ruggie (n 1) 17

diligence assessment could fill a responsibility gap for when this requirement is not enforced by the state where the corporation operates.

2.4 Concluding remarks

International law is law regulating relations between States. Because of globalisation the lines between power users have been blurred as private entities such as international organisations and multinational corporations have emerged and become more influential in world politics. International organisations such as the UN has been granted limited international subjectivity, but the debate of the status of corporations is still on-going. States are resisting the possibility of granting corporations a status of an international legal subject because of the fear that corporations could overpower them in international politics and take part in creating international customary law.

The discussion on the corporations' international legal subjectivity is proving to go round in circles and produce unsatisfactory answers. Therefore suggestions on expanding national state's jurisdiction beyond the borders of the state has been raised. However, extraterritorial jurisdiction would be complex in practice and due to complex diplomatic relations seems like an impossible task to accomplish.

However, it is apparent that something needs to be done for the responsibility gap between, where multinational enterprises can operate in States of weak governance zone and possibly infringe human rights without being held responsible by either the host state or the home state. The corporate social responsibility thinking has emerged in Business and Human Rights due to the significant influence corporations can have on socio-economic rights. There are now moral expectations on enterprises put on them by the public. Multinational enterprises are seen as social actors that can affect individual rights of the people affected by their operations and the social costs on an enterprise that does not act responsibly when doing business can be significant. The rights that these operations affect can touch virtually every recognised human rights. Even though it is the state's primary responsibility to guarantee protection for persons the activity of enterprises in this are to advance social justice is needed.

Corporations themselves can have a positive impact on the human rights of their host countries by conducting appropriate due diligence and corporate codes of conduct on the best corporate conducts, as long as they choose to follow them. However, the mere

voluntarism of the corporations is not enough. It can lead to imbalances on the responsibilities between corporations, causing a “free rider problem” as noted earlier which only leads to some enterprises acting appropriately.

The next chapter will look into a one solution of the governance gap in human rights and multinational enterprises, which consists of the OECD conducting global governance to regulate human rights effects of multinational enterprises through soft law initiative of the OECD Guidelines.

3 OECD and Global Governance

3.1 Introduction

Non-binding obligations and soft law have always been a part of the international legal system.⁸⁰ Customary law is one of the main sources of international law and the state practice, not accorded in conventions or treaties, constitutes the process of the formation of customary international law.⁸¹ Corporate human rights violations cannot be processed under customary international law because they lack the international consensus necessary to become international customary law.⁸² Hence, human rights violations and corporate social responsibility in general is increasingly regulated through soft law. One of the main actors in this field is the OECD together with ILO (International Labour Organisation) and its Tripartite Declaration⁸³ and the United Nations with its “Protect, Respect, Remedy”-framework and the UN Guiding Principles.⁸⁴ This chapter of the thesis will explain how the OECD is capable of influencing national policy-making through soft law. OECD’s work forms a part of Global Governance, which is a form of governance described as “an instance of governance in an absence of government.”⁸⁵

As the OECD is an international organisation that rarely establishes binding rules onto its member States, it is fair to ask how the Organisation can produce norms that affect national policies in various fields and why are the member States inclined to implement these norms. There is a variety of theories to explain the authority of international organisations. This chapter of the thesis will discuss the theories which are most suited to describe the OECD’s influence in the global policy-making; especially as an actor using ideals and premises as well as peer pressure to sway national policy-makers to agree with its initiatives.

⁸⁰ Article 38 (b) of the Statute of the Permanent Court of International Justice, 16 December 1920, 112 BFSP 317, “The court whose function is to decide in accordance with international law such disputes as are submitted to it shall apply... (b) International custom, as evidence of a general practice accepted as law”.

⁸¹ Shelton, Dinah, Law, *‘Non-Law and the Problem of Soft-Law’* in Dinah Shelton (ed.) *Commitment and Compliance – the role of non-binding norms in the international legal system* (Oxford University Press 2000) 1

⁸² Julia Ruth-Maria Wetzel, *Human Rights in Transnational Business - Translating Human Rights Obligations into Compliance Procedures* (Springer 2016) 1

⁸³ International Labour Organization (n 18)

⁸⁴ The United Nations, *Guiding Principles on Business and Human Rights* (n 17)

⁸⁵ John Ruggie, *‘Global Governance and New Governance Theory: Lessons from Business and Human Rights (2014) 20 Global Governance 5, 5*

The ways that an international organisation such as the OECD can persuade its member and Non-Member States to comply and commit to its policy initiatives in various fields can be described being complex by their nature. OECD's governance forms a necessary part of non-binding regulatory framework meant to answer relevant global questions such as global warming, environmental issues and issues on human rights. The reason for increased use and need of soft-law as a regulatory mechanism has to do with the "broadening subject matter of international law, the claims by and against non-state actors, and the global challenges posed by, inter alia, environmental degradation, decreasing natural resources, sustainable development, human rights violations, and disarmament."⁸⁶

One of the reasons behind the normative power of the OECD is its capability to adjust in the changing global environment. In the end of the 20th century, Global Governance has faced new phenomena such as expansion of the foreign direct investment and integration of financial markets. Due to the economic globalisation, it has become apparent that the traditional international public law can no longer satisfy the needs of the international community and therefore needs actors such as the OECD.

3.2 OECD as an International organisation

The Organisation for Economic Cooperation and Development has its roots in the times following the Second World War. Originally called as the Organisation for European Economic Cooperation, the OEEC was established in 1948 due to the US demand to "some agreement among the countries of Europe as to the requirements of the situation and the part those countries themselves will take".⁸⁷ The OEEC was created to operate the US Marshall Plan in war-torn Europe designed to rehabilitate European countries, improve exports from the US to Europe and to stop communism from spreading to fragile countries.⁸⁸ Besides reviving the European economies, OEEC had its aims in "the development of a European customs union, and, ultimately, a free trade area."⁸⁹ OEEC

⁸⁶ Christine Chinkin, 'Normative Development in the International Legal System', in Dinah Shelton (ed.) Commitment and compliance the role of non-binding norms in international legal system, (Oxford University Press 2000) 22

⁸⁷ OECD, The Marshall Plan speech at Harvard University, 5 June 1947, <<http://www.oecd.org/general/themarshallplanspeechatharvarduniversity5june1947.htm>> accessed 16 August 2019

⁸⁸ Richard Woodward (n 15), 14

⁸⁹ James Salzman, 'Decentralized administrative law in the organization for economic cooperation and development' (2005) 68 Law and Contemporary Problems 189, 190

was especially mandated to oversee the distribution of the Marshall Aid.⁹⁰ The OEEC had a major role in reviving European countries to market the economies they are today. As the European Economic Community was created in the late 1950s the OEEC lost its meaning.⁹¹

In 1960 the Organisation Economic Co-operation and Development, the OECD was established, now broadening its scope from some European States to the US and Canada as well. The OECD was brought into life with the OECD Convention on the 14 December 1960⁹² and the convention came into force on 30 September 1961. Today, there are 34 Member States to OECD, mainly western developed nations.

According to Article 1 of the Convention on the Organisation for Economic Co-operation and Development (hereinafter the Paris Convention) the aim of the OECD “shall be to promote policies designed:

- a) to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy;
- b) to contribute to sound economic expansion in Member as well as non-member countries in the process of economic development; and
- c) to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.”⁹³

The OECD was created to promote and further policies to achieve the highest possible economic development in the world. This means that its mandate can basically cover any policy-area that can have an impact on a member state’s economic growth. Therefore, it is possible for the OECD to have a global influence on for example tax policies, trade, work and education.⁹⁴ This is one of the OECD’s strengths as an international

⁹⁰ OECD, The Organisation for European Economic Cooperation, available at: <http://www.oecd.org/general/Organisationforeuropeaneconomicco-operation.htm>, accessed 16 August 2019

⁹¹ James Salzman, (n 88) 190

⁹² OECD (n 12)

⁹³ OECD Paris Convention (n 12)

⁹⁴ See the OECD’s website www.oecd.org accessed 25 June 2019

organisation as its work is not limited to one specific area, which means that it can influence global economy on a larger scale.

Another strength the OECD has as an international organisation is its ability to commit Non-Member States in its policies. Non-members are excluded from the OECD Council, which is the deciding body of the Organisation.⁹⁵ However, non-members are allowed to participate in the work of the subsidiary bodies of the OECD, which are listed in the Rule 1 b of the Rules of Procedure of the Organisation.⁹⁶ According to the Rules of Procedure “the Council may invite a non-Member to be represented by an Invitee or a Participant, or an international organisation by an observer, at meetings, or parts of meetings, of all or certain bodies of the Organisation”.⁹⁷

According to the OECD Convention Article 12 “Upon such terms and conditions as the Council may determine, the Organisation may:

- a) address communications to Non-Member States or Organisations;
- b) establish and maintain relations with Non-Member States or Organisations; and
- c) invite non-member Governments or Organisations to participate in activities of the Organisation”.⁹⁸

The majority of the work of the Organisation occurs in the committees as it is the committees that conclude the policy advises and the “soft law” that is later ratified by the Council.⁹⁹ Even though the Non-Members can mostly participate as observers, it is a way for the OECD to communicate and have a discussion also with other parties than the members only.¹⁰⁰ Non-Members can also adhere to OECD soft law mechanisms, the most important of them to this particular thesis being the OECD Guidelines for Multinational Enterprises.¹⁰¹ When adhering to the Guidelines the Non-Member States embrace the

⁹⁵ Richard Woodward (n 15) 54

⁹⁶ OECD, Rules of Procedure of the Organisation, 2013, <<https://www.oecd.org/legal/Rules%20of%20Procedure%20OECD%20Oct%202013.pdf>> accessed 16 August 2019

⁹⁷ *ibid* Rule 9 b

⁹⁸ OECD Paris Convention (n 12)

⁹⁹ Richard Woodward (n 15) 45-55

¹⁰⁰ *ibid*

¹⁰¹ OECD Guidelines (n 10)

policy recommendations included in the guidelines. Moreover the Non-Member States adhering to them are obliged to set up a monitoring body, National Contact Point, within their administration.¹⁰² The Guidelines and the National Contact Points will be discussed in more detail later in the text.

In accordance with the principle of speciality, international organisations cannot produce other legal obligations than those that the member States have conferred to them by the treaty establishing the Organisation.¹⁰³ The OECD is mandated in order to achieve its aims, according to Article 5 of the Paris Convention to:

- a) take decisions which, except as otherwise provided, shall be binding on all the Members;
- b) make recommendations to Members; and
- c) enter into agreements with Members, Non-Member States and international organisations.”¹⁰⁴

The decisions taken by the OECD are “legally binding obligations for all of the Member Countries who do not abstain when the Act is adopted and.... while they are not international treaties they do entail, for Member Countries, the same kind of legal obligations as those subscribed to under international treaties”¹⁰⁵. The recommendations, on the other hand, are non-binding for the Member States. However “practice accords them great moral force as representing the political will of Member countries and there is an expectation that Member countries will do their utmost to fully implement a Recommendation”¹⁰⁶.

¹⁰² *ibid*

¹⁰³ Niels M Blokker, ‘*International Organizations or Institutions - Implied Powers*’, Max Planck Encyclopedias of International Law, Oxford Public International law <<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e467?prd=EPIL>> 1, accessed 17 September 2019

¹⁰⁴ OECD Paris Convention (12) Article 5

¹⁰⁵ Nicola Bonucci, ‘*The legal status of an OECD act and the procedure for its adoption*’, <<http://www.oecd.org/education/skills-beyond-school/31691605.pdf>>, accessed 7 May 2019

¹⁰⁶ *ibid*

Despite of the principle of speciality, the OECD has created a large amount of other types of procedures that have the potential to create obligations to its member States.¹⁰⁷ The legal instruments can be for example good practices, guidelines and declarations. OECD declarations are to set out “relatively precise policy commitments subscribed to by the governments of Member countries. They are not formal Acts of the Organisation and are not intended to be legally binding, but they are noted by the OECD Council and their application is generally monitored by the responsible OECD body”.¹⁰⁸ These procedures include for example best practices, guidelines, official interpretations and manuals, some of which are not actually intended to guide the actions of States but that of economic actors.¹⁰⁹ The fact that these policy commitments are not with any legally binding force does not mean that they could not bear a certain amount of legal influence in the sphere of international law. According to Hervé Ascencio these norms are created to be “pre-normative”, acts that are preparations of actual legal obligations or a part of a complex legal instruments, such as the OECD Guidelines are an addition to the OECD Declaration.¹¹⁰ The manuals, guidelines, best practices and other non-formal procedures created by the OECD are also sometimes included in the annexes of the formal legal documents of the OECD Council. This creates both, the link between the methods and the aims of the OECD documents as well as the link between the OECD standards and international law.¹¹¹

Article 6 of the OECD Convention requires consensus for adoption of Recommendations and Decisions, though members may abstain and thereby enter the equivalent of a reservation. Even though the OECD Decisions are binding, they do not usually provide sanctions for noncompliance.¹¹² As mentioned earlier, International law cannot bind individuals. However, as the Member States are under the “moral obligation” to implement the soft law deriving from the OECD this does affect the actions of individuals, even if not legally obligating, but through the policies nation States put in place to protect

¹⁰⁷ Ascensio, Hervé, Les normes produites à l’OCDE et les formes de normativité, in A. Pedone (ed.) *Le Pouvoir Normatif de l’OCDE*, Société Française pour Le Droit International, Organisation de Coopération et de Développement Economiques (Journée d’études de Paris 2014) 8

¹⁰⁸ Nicola Bonucci (98)

¹⁰⁹ Ascensio Hervé (102) 8

¹¹⁰ Ibid

¹¹¹ ibid 13

¹¹² James Salzman (88) 193

the common policy aspirations they share with the other member States of the OECD and the Organisation itself.

Even though the OECD is mandated to provide legally binding decisions on Member States, as an Organisation, OECD mostly works through consultations and expert knowledge. The majority of its work is conducted through non-binding and non-enforceable tools, utilising member state officials' as well as the OECD staff members' expertise. The committees, the OECD secretariat, composed of OECD officials, and national officials work together in OECD bodies binding "the brightest folk working in a given policy area".¹¹³ The national officials bring the ideas back to their home States for the national policy makers. As well as the level of expertise that the OECD work is conducted with it is the mutual commitment of the member state officials to the shared aspirations that create a degree of legitimacy on OECD policy-making.

The globalisation has changed the world order by causing major economic developments such as expansion of world trade and integration of financial markets.¹¹⁴ As the borders between States become blurrier, the need for cooperation in the field of economy and social issues grows exponentially. This gap exists due to the lack of common international regulation has been filled with global governance, which is now highly occupied by international organisations. In the field of global governance, the OECD has been noted as an "overlooked Organisation", which as a matter of fact "exercises enormous amount of influence simply through its Organisational activities" and not given much attention in scholarly.¹¹⁵

In part due to the type of member States OECD holds and in part due to the way the OECD conducts its work, it has been characterized as a "think tank" and a "rich man's club."¹¹⁶ Conversely, it has also been quoted as "an example of a de jure powerless

¹¹³ Woodward, Richard (n 14) 53

¹¹⁴ Junne, G.C.A, *International organizations in a period of globalization: New (problems of) legitimacy* in Jean-Marc Coicaud and Veikko Heiskanen (eds) 'The Legitimacy of International Organizations' (United Nations University Press 2001) 200

¹¹⁵ James Salzman, 'Labor Rights, Globalization and Institutions: The Role and Influence of the Organization for Economic Cooperation and Development' (2000) 21 Michigan Journal of International LAW 769,772

¹¹⁶ Richard Woodward (n 15) , other forms, not discussed in the thesis: legislative framework and palliative framework

international organisation, but one which has gained regulatory influence.”¹¹⁷ In fact, the OECD has been quite successful in shaping the national policies in its member States. The Organisation works efficiently through persuading its Member States and the Non-Member States to follow their shared aspirations in world politics than through legal regulation.¹¹⁸ The authoritative power of the OECD will be discussed in the next chapter more thoroughly.

3.3 The authoritative power of the OECD

3.3.1 Governance through identity

“Although it is feasible to think that actors’ ability to influence others’ behaviour is based on structural sources of power such as money or military force, from the actors’ perspective it all boils down to their conceptions about the facts and about themselves as actors: what they are able or forced to do, and what their desires and obligations are. Therefore it is apparent that – whether they are conscious of it or not – actors who aim to be influential in politics attempt to affect others’ views of reality.”¹¹⁹

Richard Woodward has divided the forms of governance OECD uses into four parts, the most important of them being the cognitive framework and the normative framework.¹²⁰ An example of a cognitive governance Woodward uses rises from the post Second World War era. The OECD has the capacity to produce a sense of identity and community amongst the member States.¹²¹ The member States of the OECD want to establish themselves as being “a member of a community of nations committed to democratic as well as market-oriented institutions”.¹²² This approach of playing with the cognitive idea of the States on themselves has its roots in the European history. For example, Finland, right in-between the liberal west and communist Soviet Union, when joining the OECD

¹¹⁷ Dennis Niemann and Kerstin Martens, *Soft Governance by hard fact? The OECD as a knowledge broker in education policy* (2018) 18 *Global Social Policy* 267, 268

¹¹⁸ Nicola Bonucci and Jean-Marc Thouvenin, Jean-Marc, ‘L’OCDE - Site de Gouvernance Globale?’ in A. Pedone (ed.) (107) 37

¹¹⁹ Pertti Alasuutari and Ali Qadir, ‘Epistemic governance: an approach to the politics of policy-making’, (2014) 1 *European Journal of Cultural and Political Sociology*, 67, 67

¹²⁰ Richard Woodward (n 15) 63-81

¹²¹ Ibid 63

¹²² Ibid 63

in 1969 made a clear choice to be a western, liberal and democratic state.¹²³ The capitalistic and developed economies that the OECD member States gradually turned into became the “prototype for the best kinds of States” when compared to suffering planned economies of communistic States.¹²⁴ This is a prime example of shaping the identity and belonging to a community the OECD builds when creating its policies.

Pertti Alasuutari and Ali Qadir have suggested an epistemic governance point of view on the policies of policy-making. They have suggested that policy-making is depending on the actors’ “understanding of the world and the situation at hand.”¹²⁵ The power an international organisation uses to persuade the governed on the policy initiatives is by playing on the epistemic premises of the governed, whether or not the policy-maker itself is conscious of the efforts it does in persuading through appealing to the identification of other actors. To be able to persuade others, the politician must be able to show how the suggested policy is admirable by playing with the other side’s expectations and premises. As Alasuutari and Qadir puts it, the politician would have to “appeal to reliable sources of evidence, experts’ or other authorities’ views, to what she assumes are widely acknowledged values and principles, and based on all that she would argue that passing the law will be in the best interest of the nation”.¹²⁶

Despite the importance of the ontological claim on what would be the best policy on the issue at hand, According to Alasuutari and Qadir, the policy-making is not only about the ontology but also on appealing to common values and addressing the audience as a community with shared interests. Epistemic work conducted by politicians include three key proponents: ontology of the environment, actors and identifications, and norms and ideals.¹²⁷ The policy-maker has to “affect the shared view of what is a truthful and accurate picture of the situation at hand, work upon people’s understandings of themselves and others as actors (who they are, what community they belong to, and what other actors there are in the social world) and convince the actors about the right thing to do.”¹²⁸ The epistemic governance leans more on to the deep-seated values of the actors, which is more or less unself-conscious and leans on opinions and sentiments of the

¹²³ Pertti Alasuutari, *The Governmentality of Consultancy and Competition: The Influence of the OECD*, Paper Presented at the 37th World Congress of the International Institute of Sociology, Stockholm 2005, 6

¹²⁴ Richard Woodward (n 15) 63

¹²⁵ *ibid*

¹²⁶ *ibid* 71

¹²⁷ *ibid*

¹²⁸ *ibid*

public.¹²⁹ It can be shown, for example in the OECD's role in the post second world war Europe, that the OECDs operations fit the theory of the epistemic governance as it has throughout its existence convinced states on its policy-aspirations based on their common shared values such as democracy and liberalism.

To go further than the unconscious appeal to the shared deep-seated values of the States involved, Tony Porter and Michael Webb have suggested a constructivist view on the OECD policy-making. According to Porter and Webb the OECD Global Governance "involves the ongoing development of a sense of identity for members as it develops policy prescriptions appropriate for liberal-democratic countries that see themselves as world leaders, and the aspirations of member States (and some Non-Member States) to that identity gives the OECD considerable influence despite its lack of formal powers."¹³⁰ According to Porter and Webb the OECD defines the identity of member States and through this identity-shaping it also defines their perceptions of what is in their best interest.¹³¹

The OECD is capable of producing social facts and effect the identity of the actors; "Ultimately, what the OECD identifies as good policy or "best practice" becomes part of the identity of the ideal modern state — an identity to which western governments aspire, as do many non-western governments."¹³² This development of identity of the member and non-members of the OECD is a continuum of the OECD's role in the post Second World War era when the OECD was able to convince the countries of Europe on its policy initiatives by appealing to their desire to become a part of the industrial, liberal and developed west.

The constructivist theory does not dismiss the epistemic idea of the knowledge-production being the key to policy-making, and it in fact States that the identity-shaping is the most explicit in the peer review procedures, such as PISA.¹³³ By using peer reviews and comparing States with each other the OECD can set an example of what is in the best interest of any country and which values and policies the member States should renown.

¹²⁹ *ibid*

¹³⁰ Tony Porter and Michael Webb, 'The Role of the OECD in the Orchestration of Global Knowledge Networks', Paper prepared for presentation at Canadian Political Science Association annual meetings Saskatoon, Saskatchewan, Canada, Wednesday May 30, 2007, 1

¹³¹ *ibid* 3

¹³² *ibid* 4

¹³³ *Ibid*

However, according to Porter and Webb “existing research indicates that something other than convincing scientific proof is involved in the influence of the knowledge produced by the OECD.”¹³⁴

Thus, it is apparent that a membership in the OECD cluster of States, is a label that States strive for. Identification to the norms and culture of the OECD has relevance for non-members alike. OECDs operations fit both the epistemic governance theory and the constructivist theory. They both acknowledge the epistemic community theory, where the policy-making is based on the expertise and scientific analytical knowledge. However, there is more to the OECD governance. The states participating in OECD work have the same deep-seated values of economic liberalism, democracy and development. This stems from the history of the OECD as the “saviour” of the European countries and the idea of the best kind of state then implemented in the European countries’ identities. The shared values affect the policy-making today both “unconsciously” and in the on-going governance work that the OECD conducts that shape the identity of the states involved.

3.3.2 Governance through knowledge-production

The knowledge-production, also called the normative governance, of the OECD is the work conducted in the working bodies of the OECD where the policy-makers share ideas, discuss, review policies and learn from each other in the OECD working committees.¹³⁵ According to Article 3 of the OECD Convention the members are required to “keep each other informed and furnish the Organisation with the information necessary for the accomplishment of its tasks; consult together on a continuing basis, carry out studies and participate in agreed projects; and co-operate closely and where appropriate take co-ordinated action.” The work of the OECD is therefore built on cooperation between the OECD experts and the state officials.

The role the OECD plays in international relations has often been explained through theory of epistemic communities, which stresses the importance of scientists and experts in global governance.¹³⁶ “When the world becomes more globalized, decision-makers grow uncertain about what their interests are and how best to achieve them, and ideas become increasingly important as maps or frames for decision-makers in an unfamiliar

¹³⁴ Tony Porter and Michael Webb (n 130) 5

¹³⁵ Richard Woodward (n 15) 65

¹³⁶ Pertti Alasuutari and Ali Qadir (n 123) 69

setting.”¹³⁷ This is why the epistemic communities, “knowledge-based networks, most often focused on scientific, economic or technical matters” have increased in importance when persuading in policy-matters that are typical to the globalised world such as environmental protection.¹³⁸

An important part of an epistemic community is the action of learning from other actors. Members of the epistemic community participate in collective learning processes when acting as a part of an epistemic community, ending up in sharing common ideas, values and understanding.¹³⁹ The reason that these policy ideas are then accepted as a part of national political environment is the authority of the members of the epistemic communities, in the case of the OECD the national officials and the OECD experts. As Woodward States “the changed thinking seeps into wider policymaking circles when officials return to their homeland armed with ideas agreed with, or pilfered from, their counterparts.”¹⁴⁰ Hence, the knowledge-production OECD conducts is directly linked to the identity-shaping role of the Organisation as the discussions government officials have with each other and with the OECD staff can effectively change the way that the national policy-makers see the world around them.

Conversely, some scholars argue, that the emphasis on the epistemic community is on the teaching, when learning on the other hand “is often conceptualised as the unidirectional diffusion of norms, rather than as an interactional, mutual process.”¹⁴¹ According to Alasuutari and Qadir, the epistemic communities approach “tend to overlook how decision-makers are convinced in the first place that particular policies must be implemented, especially in a global context. The question of whether there is any analytical unity in the processes of such persuasion work has not been addressed.”¹⁴²

For an international organisation that has no formal jurisdiction over its member States and no possibilities to set sanctions on non-compliance, the authority of that Organisation rises from its legitimacy. This, stems from the Organisation’s reputation¹⁴³ as the

¹³⁷ Peter Haas, ‘*Epistemic Communities*’, in Daniel Bodansky, Jutta Brunnée and Ellen Hey (ed.), *Oxford Handbook of International Environmental Law*, (2007 Oxford University Press) 791

¹³⁸ *ibid* 792

¹³⁹ Jutta Brunnée and Stephen J. Toope, ‘*Legitimacy and Legality in International Law – An international Account*’ (2010 Cambridge University Press) 61

¹⁴⁰ Richard Woodward (n 15) 65

¹⁴¹ Jutta Brunnée and Stephen J. Toope (n 139) 62

¹⁴² Pertti Alasuutari and Ali Qadir (n 123) 70

¹⁴³ Dennis Niemann and Kerstin Martens (n 117) 270

authority of the Organisation is dependent on the judgements on the reputation on that Organisation.¹⁴⁴ “The effect is reinforced by the diffuse sense that the OECD’s knowledge is an expression of the best States’ best practices.”¹⁴⁵ According to Woodward, “In a congested market place for information and ideas those stamped with the OECD imprimatur are seldom, or ever, accused of bias or political manipulation”.¹⁴⁶ Therefore also the normative governance in fact, also leans to the reputation that the OECD holds as an “impartial observer of global events”.¹⁴⁷

As the OECD does not use material sanctions. The OECD practices rely on the “authoritative and moral resources.”¹⁴⁸ These resources derive from the peer pressure that the States face from both the OECD and other member States. The mostly used form of peer pressure by OECD comes from the peer reviews conducted on national policies. They can be defined as: “systematic examination and assessment of the performance of a State by other States, with the ultimate goal of helping the reviewed State improve its policy making, adopt best practices, and comply with established standards and principles.”¹⁴⁹ The peer review processes cause peer pressure through “a mix of formal recommendations and informal dialogue by the peer countries; public scrutiny, comparisons, and, in some cases, even ranking among countries; and the impact of all the above on domestic public opinion, national administrations and policy makers.”¹⁵⁰ Peer review can best be described as “soft persuasion” that drives the state to change its policies so that it can better reach the aspired goal, for example in the case of PISA, to establish the best possible educational system.

It can be concluded that: The normative governance that the OECD exerts in the form of peer reviews and peer pressure combines both the cognitive side where the States are influenced through the image they are trying to achieve and the policies that are widely considered as best policies due to the un-biased expert knowledge production as well as

¹⁴⁴ J.C Sharman (n 16) 30

¹⁴⁵ Tony Porter and Michael Webb (n 130) 6

¹⁴⁶ Richard Woodward (n 15) 67

¹⁴⁷ *ibid*

¹⁴⁸ Richard Woodward (n 15) 67

¹⁴⁹ Fabrizio Pagani, ‘Peer review: a tool for co-operation and change an Analysis of an OECD Working Method’ (2002) <<https://www.oecd.org/dac/peer-reviews/1955285.pdf>>, 4 accessed 10 September 2019

¹⁵⁰ *ibid* 6

the power of the information turned into policies. The case in point that will be discussed next is the PISA peer review process, where both approached can clearly be traced.

3.3.3 Authority of the OECD – an example: The PISA

One of the most substantial evidence of the functioning of the OECD's governance is the Programme for International Student Assessment, PISA, which is a peer review process, conducted every three years in member States and Non-Member States that want to take part in the review procedure. The PISA programme was established by a formally binding decision under Article 5 of the OECD Convention and the programme was first launched in 1997 as a part of OECD's social efforts to improve labour markets.¹⁵¹ With PISA States can see how well their educational systems performed when compared to other States. PISA instigates the performance rates of educational systems as well as “foster lifelong learning.”¹⁵² PISA tests 15-year-old students in reading, mathematics and science. In 2018, PISA was participated by 80 countries and economies.¹⁵³ When compared to the amount of OECD member States, 34, the PISA has reached a large audience and established a significant role in educational policies in the world.

The most important reason for establishing the PISA was the value of the actual information on the state of the national education for national policy-makers on knowing how to improve educational systems. The deeper reason for the OECD as to why conduct peer reviews on students stems from the idea that “an economy's health can be determined by the capacity of its citizens to compete in a global environment”¹⁵⁴ and for a state to establish a good educational system is necessary to the further economic, scientific and social development.¹⁵⁵ According to the OECD, the economies of the member States are dependent on highly educated workers and even though there is still work for individuals with lower qualities, their work prospects are “relatively challenging.”¹⁵⁶ According to

¹⁵¹ Armin Von Bogdandy and Matthias Goldmann, 'The Exercise of International Public Authority through National Policy Assessment' (2008) 5 Int'l Org L Rev 241, 255

¹⁵² Richard Woodward (n 15) 39

¹⁵³ See OECD's website for PISA <<http://www.oecd.org/pisa/>> , accessed 17 August 2019

¹⁵⁴ Pasi Reinikainen, 'OECD's Assessment Programmes: Why and How?' in *PISA, PIAAC, AHELO. Miksi ja miten OECD mittaa osaamista?*, publication of the Finnish Ministry of Education and Culture, 2010:17, <<http://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/75518/okm17.pdf>> ,12, accessed 20 August 2019

¹⁵⁵ Dennis Niemann and Kerstin Martens (n 117) 268

¹⁵⁶ OECD, Education at a Glance 2018: OECD Indicators, OECD Publishing, 2018, <<https://www.oecd-ilibrary.org/docserver/eag-2018-en.pdf?expires=1566287534&id=id&accname=ocid194948&checksum=5998DFE158CF757D458F531B59B8D2B2>>, 70, accessed 20 August 2019

the OECD research, “On average across OECD countries, the unemployment rate is almost twice as high for those who have not completed upper secondary education as for those with higher qualifications: 15% of younger adults (age 25-34) without upper secondary education are unemployed, compared to around 7% for those with a higher level of education.”¹⁵⁷ It is therefore clear, that national educational systems and improving them are of a high interest for the OECD and the Member States. It is the high public interest on the national educational policies as a necessity for economic growth and development gives the justification for OECD to use its normative power on educational system, as it is mandated to establish any policies that further the economic development of its member States.

By reviewing national policies OECD utilises its authority in the eyes of its member States and its so-called moral resources, for example the loss of reputation amongst peers when failing in reviews.¹⁵⁸ Other than the loss of reputation peer reviews conducted by the OECD include “the power of surveillance and monitoring” that builds pressure on States to comply.¹⁵⁹ From the cognitive approach, Porter and Webb state that by knowledge-production OECD is capable of transforming knowledge into social facts that exist beyond the conscious influence of the policy makers.¹⁶⁰ When looking at the PISA program and the way it is now a real measurement of how well each state act in the educational field and actively aspire to reach the higher score in the PISA reviews by extensive reforms such in national policies, it is able to lean towards this way of thinking. PISA reviews are a perfect example of the authority of the OECD both from the point of view that the OECD is capable of shaping identities through transforming knowledge into social facts, which influence the way that the participants identify themselves as well as from the point of view where the States can learn from each other’s policies as well from the side where the peer reviews exert the power of peer pressure onto the member States not to fail.

Armin von Bogdandy and Matthias Goldmann have researched the PISA reviews in the perspective of public international law and how OECD in fact uses public authority conducting peer reviews as opposed to the traditional view where the public authority can

¹⁵⁷ *ibid* 71

¹⁵⁸ Richard Woodward (n 15), 67

¹⁵⁹ Rianne Mahon and Stephen McBride, ‘*Standardizing and disseminating knowledge: the role of the OECD in global governance*’ (2009,) 1 *European Political Science Review* 87

¹⁶⁰ Tony Porter and Michael Webb (n 123) 5

only be displayed by the sovereign ruler of a nation state. At first, one could see the PISA purely as an act of consultancy and expertise, where OECD gathers data from the PISA adhering States and publishes the results of the data-collection. Von Bogdandy and Goldmann state that in conducting the reviews OECD uses its analytical knowledge in a form of public authority as the OECD is capable of using regulatory force over the adhering states through the reviews.¹⁶¹

According to von Bogdandy and Goldmann even consensual-based international decision-making disturbs the national accountability mechanisms, as the monitoring of international decision-making for national operators such as NGO's possibilities to monitor the conducts is limited. However, the economic and political risks for not participating in international co-operation can be a lesser evil for the States.¹⁶² This changes the idea of public authority consisting purely of legal orders accompanied by sanctions. According to their research this idea of public authority does no longer reflect the modern global state. It follows that according to their research "any activity with a certain impact on liberty should come under the definition of public authority, and not only legal commands."¹⁶³

Von Bogdandy and Goldmann suggest that a legal framework should be built for PISA due to its influence on national policies, but has not yet been established as it is ignored by lawyers because of its lack of formal legal obligations.¹⁶⁴ The traditional idea of forming other's behaviour through mere legal powers has passed its expiration and act of an entity such as an international organisation should be regarded as public authority whenever this action is public and shapes the actions of others. As the PISA reviews have de facto caused States, e.g. Germany to conduct in massive reforms on its public educational system, the OECD has succeeded in using de facto public authority to shape its actions.¹⁶⁵

The character that the PISA lacks if considered a modern public authority is the accountability mechanism. In democracies, individuals are safeguarded from the use of public authority with administrative structures, such as fair procedures and a possibility

¹⁶¹ Armin von Bogdandy and Mathias Goldmann (n 151), 258

¹⁶² *ibid* 259-260

¹⁶³ *ibid*

¹⁶⁴ Armin von Bogdandy and Mathias Goldmann (n 151) 244

¹⁶⁵ Armin von Bogdandy and Mathias Goldmann (n 151) 242

for judicial review. This so-called legitimacy function is necessary for national States but also for international organisations.¹⁶⁶ The OECD is known for its closed-door meetings, and the Organisation lacks the administrative requirements for legitimacy. There is no transparency, responsiveness or public accountability in the way the OECD works.¹⁶⁷ Therefore as von Bogdandy and Goldmann have suggested there should be a legal framework guaranteeing that the public authority used in international Organisations would still guarantee individual freedoms.¹⁶⁸

The PISA is a proof of global governance which is against the presumption, that “actors’ preferences are fixed and that their behaviour can therefore only be influenced by instruments backed by sanctions which change an actor’s expected outcome to an extent that makes him likely to comply.”¹⁶⁹ The OECD has shown that by engaging States into a peer review process can affect their behaviour. This is done by producing analytical information and ranking States on their level of performance but also by affecting the States’ views of the importance of succeeding in these rankings as a part of their identity as successful modern States.

3.4 Concluding remarks

OECD is the embodiment of the new global governance which does not need treaties or conventions to produce some form of binding regulation. It has established itself from orchestrator of the Marshall Plan to a relevant international organisation with *de facto* power to persuade States to comply with its policy initiatives. It is capable to adjust to global changes through its soft law system where it is capable to produce new information and new guidance quickly due to their non-binding nature. It is exclusive and constantly tries to effect Non-Member States by including them in the OECD process.

There are numerous theories of the way international organisations work. OECD can affect the premises of the States through national officials engaging in discussions with other national officials and OECD experts in working committees. This way it is possible

¹⁶⁶ Armin von Bogdandy and Mathias Goldmann, (n 151) 259

¹⁶⁷ James Salzman (n 88) 194

¹⁶⁸ Armin von Bogdandy, Goldmann (n 151) 245

¹⁶⁹ *ibid* 247

for the Organisation to create an atmosphere where the States can share values and ideas which affect their policy-making back home.

OECD can influence national policy-making through identifications of actors as well as through knowledge production and peer pressure. OECD can appeal to the deep-seated values and a sense of community of the members. By having the reputation of an unbiased expert knowledge producer it is able to sway its members that the OECD initiatives reflect the best possible practice a state can have. By conducting peer reviews on existing national policies OECD can put peer pressure onto its members to reform for example their national education system to become this example of the best possible state it can be.

After shedding light to the methods on how the OECD uses its influence on States, it can be deducted that the most effective tool OECD has in its hands is the peer review process. The best example of the peer reviews' success is the PISA, which by reviewing the national policies and ranking them has managed to cause peer pressure so high amongst the participating States that by conducting the peer review process, the Organisation uses public authority hence regulates the actions of the States participating in the PISA.

It is also possible to view the OECD knowledge production from the angle of public international law. No longer it is not merely just the state which can use public authority over the governed. By influencing the acts of the member States the OECD uses public authority also in a juridical meaning over the States that follow its policies. By these actions OECD has shown, that it does not in fact need binding norms to establish a significant role in global governance. If the OECD would be considered as a public authority over its member States, further amendments related to accountability would have to be agreed in order to ensure so the rights of the governed.

4 OECD and the Regulatory framework on Human Rights

4.1 OECD Guidelines for Multinational Enterprises

4.1.1 Background

During the last decades, globalisation has changed the international politics. The number of private entities connecting beyond state borders and participating in world economics has raised. According to OECD Globalisation Indicators, this has generated “important welfare effects, including higher productivity and efficiency, increased average incomes and wages, greater competition, lower prices and increased product variety and quality.”¹⁷⁰ At the same time, globalisation has increased injustice between developed western states and the developing countries. Multinational enterprises have the upper hand in so-called “weak governance zones”, which are interdependent on foreign direct investment and the capital flow from abroad. As traditional international public law does not regard enterprises and individuals as subjects of international law there are numerous problems with international accountability.

The OECD Guidelines for Multinational Enterprises (the Guidelines) were first established in 1976 as a part of the Ministerial Declaration on International Investment and Multinational Enterprises (The Declaration).¹⁷¹ The Declaration on International Investment and Multinational Enterprises was established in 1976 as a promotional tool for international investment. According to the Article 2 of The Declaration the “adhering governments should, consistent with their needs to maintain public order, to protect their essential security interests and to fulfil commitments relating to international peace and security, accord to enterprises operating in their territories and owned or controlled directly or indirectly by nationals of another adhering government treatment under their laws, regulations and administrative practices, consistent with international law and no less favourable than that accorded in like situations to domestic enterprises.”¹⁷² The Declaration, according to the OECD was a “policy commitment by adhering governments to provide an open and transparent environment for international investment and to

¹⁷⁰ OECD, ‘*Measuring Globalisation: Economic Globalisation Indicators 2010*’, <<https://www.oecd-ilibrary.org/docserver/9789264084360-en.pdf?expires=1568373338&id=id&accname=ocid194948&checksum=D237714C04F6F0701EE884F562093A09>>, 7, accessed 20 August 2019

¹⁷¹ OECD, OECD Declaration on International Investment and Multinational Enterprises (11)

¹⁷² *ibid* Article 2

encourage the positive contribution multinational enterprises can make to economic and social progress.”¹⁷³

The Guidelines, as an addition to the Declaration, was a reaction to increasing unethical corporate conduct when operating out of their national states.¹⁷⁴ Another reason for adopting the guidelines was the threat that the UN would establish obligatory regulation on the multinational enterprise’s and the non-binding OECD Guidelines were a way to slow down the procedure of creating normative regulation.¹⁷⁵ The Guidelines are “recommendations addressed by governments to multinational enterprises operating in or from adhering countries. They provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards.”¹⁷⁶ According to Ruggie and Nelson, “companies were merely advised to comply with national laws and encouraged to make a positive contribution to economic and social progress in their countries of operation.”¹⁷⁷ The 1976 version of the guidelines seemed lacking the regulatory scope necessary as the guidelines were only applicable in host States that were also member States of OECD or adhering States to The Declaration, which usually were not the States where the most company inflicted human rights violations happen.

Since the extensive reviews on the Guidelines there has been both praise and critique. The critique has mainly concentrated on the voluntary form of the guidelines and the weak authority especially in the work of the NCPs.¹⁷⁸ Yet, the NCP system has also received some cautious praise on the fact that the NCPs even though not being a formal dispute settlement mechanism, applies peer pressure on the implementing state leading to a “reasonable degree of compliance.”¹⁷⁹ However, the most important improvements on

¹⁷³ OECD website on International Investment <<https://www.oecd.org/daf/inv/investment-policy/oecddeclarationanddecisions.htm>>, accessed 21 August 2019

¹⁷⁴ James Salzman (n 115) 788

¹⁷⁵ Andrew Clapham (n 20) 201

¹⁷⁶ OECD, The Guidelines (n 10) 3

¹⁷⁷ John Ruggie and Tamaryn Nelson, ‘Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges’, (2015) 22 *Brown Journal of World Affairs* 99, 101

¹⁷⁸ John Evans and Kristine Drew, ‘The OECD Guidelines for Multinational Enterprises responsible business conduct in a global context’, in A Pedone (ed.) (n 107) 132

¹⁷⁹ Jan Huner, ‘The Multilateral Agreement on Investment and the Review of the OECD Guidelines for Multinational Enterprises’, in Menno T. Kamminga and Saman Zia-Zarifi (ed.), ‘Liability of Multinational Corporations under International Law’ (n 5) 198

the guidelines were the extending the scope of the guidelines on the part of human rights and due diligence, which will be discussed next.

4.1.2 OECD guidelines today

Since the Guidelines were first adopted in 1976, they have been reviewed a few times, the latest update on the Guidelines taking place in 2011. The renewed guidelines included numerous improvements to their predecessor, including the adoption of the principle of “risk-based due diligence” which requires that the enterprises “Carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts.”¹⁸⁰

On the human rights point of view, the biggest change to the Guidelines was the adoption of a human rights chapter, that follows the wording of the Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework.¹⁸¹ Before 2011, the only human rights that were specifically mentioned in the Guidelines were the ones related to labour rights and a general principle on the responsibility of enterprises to “respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments.”¹⁸²

Now the Guidelines cover numerous areas of corporate social responsibility: human rights, employment and industrial relations, environment, combating bribery, consumer interests, science and technology, competition and taxation. As stated in the general principles of the Guidelines, enterprises have acted in accordance with the principle of due diligence in all of the areas covered by the guidelines.¹⁸³ The Guidelines also consist of commentaries on the chapters and procedural guidance for both the national contact points and the investment committee, to support the actors both implementing the

¹⁸⁰ OECD, the Guidelines (n 10), General policies, paragraph A. 10. Paragraph A 11: “Avoid causing or contributing to adverse impacts on matters covered by the Guidelines, through their own activities, and address such impacts when they occur”.

Paragraph A 12 : “Seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship. This is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship.”

¹⁸¹ OECD, the Guidelines, chapter IV

¹⁸² Jernej Letnar Cernic, *Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises*, (2008) 4 *Hanse L. Rev.* 71, 80, the responsibility to respect human rights in corporate activities was included in the General Policies of the OECD Guidelines 2000

¹⁸³ OECD, The Guidelines (n 10), Commentary on General Policies 14

guidelines as well as enterprises to understand better how to comply with the requirements of corporate social responsibility.

The reviewed Guidelines recognise that the States have the duty to protect human rights. However, the reviewed guidelines encourage enterprises to respect human rights and address adverse human rights with which they are involved with. The UN Guiding Principles were implemented in the chapter IV of the Guidelines. According to the renewed Guidelines, enterprises should avoid causing or contributing to adverse human rights impacts and seek ways to prevent or mitigate adverse human rights impacts directly linked to their business operations. Enterprises should have a policy commitment to respect human rights, carry out human rights due diligence appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts. The renewed human rights chapter also includes remedy for the victims of corporate conduct violating human rights. Enterprises should provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts.¹⁸⁴ The adopted human rights chapter is a welcome addition to the Guidelines as it recognises a certain positive obligation for enterprises when it comes to human rights issues.

The reviewed Guidelines are addressed to all entities within a multinational enterprise (parent companies and/or local entities). According to the actual distribution of responsibilities among them, different entities are expected to co-operate and to assist one another to facilitate observance of the Guidelines.¹⁸⁵ This amendment is especially beneficial for the NCP complaints mechanisms, as before the reform the NCP complaints tended to be inadmissible due to the lack of “investment nexus”, meaning that there was no link between the corporation, which was accused of human rights violations, and the entity that committed the violation.¹⁸⁶ The update of the Guidelines strengthened the role of the NCPs in other ways as well. It has been argued, that due to the implementation of the United Nations Guiding Principles and adoption of the requirement of risk-based due

¹⁸⁴ OECD, the Guidelines (n 10) chapter IV

¹⁸⁵ OECD Guidelines (n 10) Concepts and Principles, 17 para 4

¹⁸⁶ John Ruggie and Tamaryn Nelson (n 169), 17

diligence means that the NCPs “are *de facto* remedial institutions for the UN Framework and United Nations Guiding Principles”.¹⁸⁷

4.2 The National Contact Points

4.2.1 Introduction

The uniqueness of the Guidelines as a tool for regulating corporate social responsibility rises from the fact that amongst the other international regulatory frameworks (ILO Tripartite declaration and the UN Guiding principles) there is no similar system to assist on the implementation of the Guidelines. The Guidelines is the only regulatory framework with an institutional mechanism to promote the guiding principles established in the guidelines and to provide mediation and good offices to the victims of the violation and the corporations accused of them.¹⁸⁸ National Contact Points are mandated to participate in “the resolution of issues that arise relating to the implementation of the Guidelines in specific instances.”¹⁸⁹ Specific instance refers to a complaint placed by an individual or an NGO on a violation of the guidelines committed by a multinational enterprise head-quartered in an adhering state to the Guidelines.¹⁹⁰

Even though it is the NCPs that differentiates the Guidelines from other international legal instruments on corporate social responsibility, the system in itself is in parts somewhat problematic and has been under scrutiny from NGO’s such as the OECD Watch and The Trade Union Advisory Committee (TUAC) to the Organisation for Economic Co-operation and Development. These problems will be addressed in detail later.

The Guidelines were established by an OECD recommendation. The voluntary characteristic of the Guidelines is compensated with the binding decision obligating all the adhering States to implement an NCP in their home States.¹⁹¹ The NCPs were included in the Guidelines in 1984. However, it was not until 2000 that the Decision of the Council on the OECD Guidelines for Multinational Enterprises was adopted. The review of 2000

¹⁸⁷ Karin Buhmann, ‘*Analysing OECD National Contact Point Statements for Guidance on Human Rights Due Diligence: Method, Findings and Outlook*’ (2018) 36Nordic Journal of Human Rights 390, 391

¹⁸⁸ Gita Kothari, ‘*L’Élaboration des principes et standards à l’intention des entreprises: l’approche innovante de l’OCDE*’ in A. Pedone (ed.) (n107) 101

¹⁸⁹ OECD, The Guidelines (n 10), Procedural Guidance at C. Implementation of Specific Instances, 72

¹⁹⁰ John Evans and Kristine Drew, ‘*The OECD Guidelines for Multinational Enterprises responsible business conduct in a global context*’, in Le Pouvoir Normatif de l’OCDE (100), 129-130

¹⁹¹ OECD, ‘*Decision of the Council on the OECD Guidelines for Multinational Enterprises*’, OECD/Legal/0307, adopted on 27 June 2000, amended on 25 May 2011

introduced enhanced procedural guidelines, annual meetings, and transparency enhancing reporting requirements for the NCPs.¹⁹²

According to the Decision para 1.1 “Adhering countries shall set up National Contact Points to further the effectiveness of the Guidelines by undertaking promotional activities, handling enquiries and contributing to the resolution of issues that arise relating to the implementation of the Guidelines in specific instances, taking account of the attached procedural guidance. The business community, worker Organisations, other non-governmental Organisations and other interested parties shall be informed of the availability of such facilities”. Hence, it is obligatory to the adhering States to establish NCPs within their governments. Now all 48 adhering States have established NCPs.¹⁹³

The NCPs are responsible for handling special instances with “visibility, accessibility, transparency and accountability to further the objective of functional equivalence”. As according to the Procedural Guidance “the NCP will contribute to the resolution of issues that arise relating to implementation of the Guidelines in specific instances in a manner that is impartial, predictable, equitable and compatible with the principles and standards of the Guidelines. The NCP will offer a forum for discussion and assist the business community, worker Organisations, other non-governmental Organisations, and other interested parties concerned to deal with the issues raised in an efficient and timely manner and in accordance with applicable law.”¹⁹⁴

Even though it is obligatory for adhering States to establish NCP’s it is still completely voluntary for a business enterprise to take part in NCP consultations. NCP’s cannot give enforceable judgements on the specific instances they handle. In fact the only negative impact that the enterprise might have on not recognizing the OECD Guidelines and not participating in NCP dispute resolution is that their non-compliance will be included in the public statement on the procedure.¹⁹⁵ Yet, the role of enterprise’s loss of reputation should not be discarded, as the public is increasingly more educated on the issues of corporate social responsibility and boycotts on the company or their products can cause

¹⁹² Kenneth A. Reinert, Oda T. Reinert & Gelaye Debebe: *‘The new OECD Guidelines for Multinational Enterprises: better but not enough’* (2016) 26 Development in Practice, 816, 818

¹⁹³ OECD, The website for the National Contact Points, <<http://mneguidelines.oecd.org/ncps/>>

¹⁹⁴ OECD, The Guidelines (n 10), Procedural Guidance, 1

¹⁹⁵ Dubin, Laurence, *‘L’Élaboration des Principes à l’intention des Entreprises Multinationales par l’OCDE ou comment globaliser la régulation du comportement d’un acteur global?’*, in A. Pedone (ed.) (n 107) 114

a big loss of money flow to the enterprise. The NCP system can also fill a “transnational remedy gap” as Karin Buhmann calls it. She concludes that, because of the NCPs possibility to handle breaches of the Guidelines happening in a state that does not have its own NCP the OECD procedure for handling specific instances has a “rare extraterritorial reach that no national jurisdiction has.”¹⁹⁶

4.2.2 Issues with the structure of the NCP system

First, there is no international instrument that regulates the establishment of the NCP so it is the States that have the mandate to nationally set up NCPs within their respected governments. The Governments are free to act as they see as long as their conduct is in accordance with the Procedural Guidance attached to the Decision. According to the OECD Watch, “the institutional structure of these entities had displayed a considerable variety of different forms.”¹⁹⁷ At first glance, this might not seem so problematic, but what the variety of institutional structure between the NCPs in different States can cause are big variations between NCP operations, which increases unpredictability and ineffectiveness of the NCP actions. Non-coherence of NCP conducts also results in unpredictability and ineffectiveness of the NCP system as a whole.

Second, concerning the organising of the NCPs is the question of impartiality. According to the OECD Annual Report on the OECD Guidelines for Multinational Enterprises of January 2018, 31 NCPs are based in Ministries of Economy, five in Investment Promotion Agencies and seven in Ministries of Foreign Affairs.¹⁹⁸ The Ministries of Economy and Foreign Affairs also have on their agenda to improve their national companies’ status in the global markets.¹⁹⁹ In January 2018, only four States had NCP’s that were not based in government administration.²⁰⁰ As the NCPs are organised by the governments and are based in government administration the question of conflict of interests and impartiality

¹⁹⁶ Karin Buhmann (n 187) 392

¹⁹⁷ OECD Watch, The State of Remedy under the OECD Guidelines (2019) <<https://www.oecdwatch.org/wp-content/uploads/sites/8/2019/06/State-of-Remedy-2018-2019-06-08.pdf>>, 13, accessed 18 September 2019

¹⁹⁸ OECD, Annual Report on the OECD Guidelines for Multinational Enterprises 2017 (2018) 27 <<https://mneguidelines.oecd.org/2017-Annual-Report-MNE-Guidelines-EN.pdf>> accessed 2 July 2019

¹⁹⁹ Robert McCorquodale and Penelope Simons (n 32) 598

²⁰⁰ Denmark, Lithuania, Norway and The Netherlands. OECD, Annual Report on the OECD Guidelines for Multinational Enterprises 2017 (n 196) 28

risks. The conflict of interest may be a valid concern especially when companies are fully or partially state-owned.

The Investment Committee is an organ which offers guidance for the NCPs. Its task is to consider requests from NCPs for assistance in carrying out their activities, including in the event of doubt about the interpretation of the Guidelines in particular circumstances.²⁰¹ When handling specific instances “The Committee shall be responsible for clarification of the Guidelines. Parties involved in a specific instance that gave rise to a request for clarification will be given the opportunity to express their views either orally or in writing. The Committee shall not reach conclusions on the conduct of individual enterprises”.²⁰² The Committee does not conduct formal monitoring or follow-up on different state’s NCP procedures. The OECD recommends the NCPs to establish multi-stakeholder advisory and oversighting bodies. Yet, in 2018, only six NCPs reported having a combined advisory and oversighting body.²⁰³

4.2.3 Specific instances in the NCP

4.2.3.1 The procedure of handling specific instances

The specific instance procedure was established to offer a forum for discussion and assist the business community, worker Organisations, other non-governmental Organisations, and other interested parties concerned to deal with the issues raised in an efficient and timely manner and in accordance with applicable law.²⁰⁴ After the 2011 review of the Guidelines, the amount of human rights complaints planted in the NCPs has risen exponentially.²⁰⁵

When providing assistance in a specific case, according to the Procedural Guidance, “the NCP will make an initial assessment of whether the issues raised merit further examination and respond to the parties involved”.²⁰⁶ This is the first obstacle that a complaint may face when planted in the NCP. The NCP can reject the case for example

²⁰¹ OECD, the Guidelines (n 10), Procedural Guidance, C. Implementation in specific instances, II Investment Committee, 74 para 1

²⁰² OECD, Amendment of the Decision of the Council on the OECD Guidelines for Multinational Enterprises, II. The Investment Committee, 69 para 4

²⁰³ OECD, Annual report on the OECD Guidelines for Multinational Enterprises (n 196) 41

²⁰⁴ OECD, the Guidelines (n 10), Procedural Guidance, C. Implementation in specific instances II Investment Committee 68 para 1

²⁰⁵ John Ruggie and Tamaryn Nelson (n 170), 107

²⁰⁶ OECD, the Guidelines (n 10), Procedural Guidance, C. Implementation in specific instances, 72 C para 1

because of technical issues such as a case not involving a company that is a national of an OECD or OECD-adhering country.²⁰⁷ After the 2011 review the admissibility of cases has increased compared to the time before the 2011 review when the inadmissibility rate of the complaints was a staggering 40 percent.²⁰⁸ The reason that the admissibility of the complaints has risen is due to the broader scope of the new guidelines, as they now concern enterprises throughout the whole supply chain. Before the reform, according to John Ruggie and Tamaryn Nelson, “the common bases for excluding cases was the lack of an “investment nexus,” as the multinational involved did not hold equity in the enterprise in question.”²⁰⁹ However, the NCPs still receive criticism on their admissibility criteria and especially the non-coherency of it amongst NCPs. The OECD Watch has stated that some of the NCPs misinterpret the criteria of admissibility or over-analyse the facts in the initial assessment stage, which leads to dismissing cases that should not be dismissed.²¹⁰ The criteria of admissibility is listed in the OECD Commentary on the Procedural Guidance. For the case to have merits for further examination the NCP will examine, whether the issue is bona fide and relevant to the implementation of the Guidelines.²¹¹

OECD Watch’s report notes the case of FIDH et al vs. Italtel from 2018 that, according to the report, was “unduly rejected” by the Italian NCP in the initial assessment stage due to wrongful interpretation of the admissibility criteria.²¹² The issue concerned adverse impact of the actions of Italtel on Human Rights in Iran. According to the complaint, Italtel did not act in accordance with the requirement of due diligence when forming a memorandum of understanding with an Iranian telecommunications company, and therefore enabled the Iranian Government and Islamic Revolutionary Guard to conduct internet censorship and surveillance. According the complainants, there was a risk that Italtel would participate in violating the Iranian people’s “right to freedom of information

²⁰⁷ John Ruggie and Tamaryn Nelson (n 170) 111

²⁰⁸ *ibid* 112

²⁰⁹ *ibid* 112

²¹⁰ OECD Watch, The State of Remedy under the OECD Guidelines (n 195) 5

²¹¹ OECD, the Guidelines (10) Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, 82 para 25

²¹² Italian National Contact Point for the OECD Guidelines, submitted on the 13th September 2017, FIDH, REDRESS and Justice for Iran versus Italtel S.p.A, <[https://pcnitalia.mise.gov.it/attachments/article/2035928/FIDH_et_al_vs._ITALTEL_-_Initial_assessment_to_be_published_DEF%20\(7\).pdf](https://pcnitalia.mise.gov.it/attachments/article/2035928/FIDH_et_al_vs._ITALTEL_-_Initial_assessment_to_be_published_DEF%20(7).pdf)>, accessed 18 September 2019

and expression and the right to privacy of the Iranian people as guaranteed by the international human rights standards.”²¹³

The Italian NCP rejected the complaint as it was “not material or sufficiently substantiated to warrant further consideration”. The requirement of the issue being material or sufficiently substantiated comes from the OECD Commentary on the Procedural Guidance of the OECD Guidelines. The Italian NCP interpreted, that there was no link between the enterprises activities and human rights violence, because “no contract has been signed by Italtel after the memorandum of understanding; thus, at present, the contents and the details of the prospective contract are not finalized and they may change over the period. This inevitably implies that the current business relationship cannot be assessed as an actual or potential breach of the OECD Guidelines” and that the “the project involving Italtel has a limited scope within the context of the telecommunication system of Iran.”²¹⁴ According to OECD Watch, the early rejection of an issue shuts down a valid arena for discussion between the complainant and the enterprise.²¹⁵

If the case is admissible, the NCP “offers its good offices to help the parties involved to resolve the issues. The NCP will consult with these parties and where relevant seek advice from relevant authorities, and/or representatives of the business community, worker Organisations, other nongovernmental Organisations, and relevant experts; consult the NCP in the other country or countries concerned; seek the guidance of the Committee if it has doubt about the interpretation of the Guidelines in particular circumstances; offer, and with the agreement of the parties involved, facilitate access to consensual and non-adversarial means, such as conciliation or mediation, to assist the parties in dealing with the issues.”²¹⁶

Even though it is mandatory for governments to establish NCPs in their respected countries it is in no way obligatory for the Multinational Enterprise to take part in the procedure or accept the “good offices” and mediation provided by the NCP. In this phase of the NCP procedure, the NCP’s main task is to facilitate the discussion between the complainant, the enterprise and other parties that are involved. An NCP can request for

²¹³ Ibid 4 para 34

²¹⁴ Ibid, the Italian NCPs review on the admissibility 6-8 paras 45-64

²¹⁵ OECD Watch, the State of Remedy under the OECD Guidelines (n 195), 2

²¹⁶ OECD, The Guidelines (n 10) Procedural Guidance C. Implementation in specific instances, 72 C para 2

advice from other NCPs as well as from the Investment Committee and experts on the matter.²¹⁷ According to OECD, in 2018 only three out of eleven cases which went on to the mediation procedure reached an agreement.²¹⁸ The statistics show there is a lot of room for improvement in the efficiency of the mediation procedure, as reaching an agreement in the mediation procedure is obviously the aim of the whole NCP system. The lack of success in mediation can also be traced to lack of resources and staff of the NCPs.²¹⁹

4.2.3.2 The conclusion of a specific instance

The last phase of the NCP procedure is the conclusion of a specific instance. Once the case has been accepted for the procedure and negotiations of the parties involved are finished, NCP issues either reports or statements based on the procedure.²²⁰ When the parties “reach agreement as a result of the NCP’s intervention, the NCP should issue a report describing, at a minimum, the issues raised, the procedures initiated by the NCP in assisting the parties, and when the agreement was reached”. When there is no agreement reached the NCP “should issue a statement describing, at a minimum, the issues raised, the reasons why the NCP decided that the issues merit further consideration, and the procedures initiated by the NCP in assisting the parties.”²²¹ These documents are to be made publicly available.

In their public statements NCPs may issue recommendations, not defined in the Procedural Guidance, but which are according to the OECD, “suggested actions the parties are encouraged to take in order to resolve the issues; and in particular, suggested actions that the enterprise in question is encouraged to take in order to observe the Guidelines.”²²² Another tool, not included in the Procedural Guidance, is the possibility of the NCPs to produce determinations on the cases, which are “statements by NCPs setting out their views on whether the company observed the Guidelines.”²²³

²¹⁷ Gefion Schuler, *‘Effective Governance through Decentralized Soft Implementation: The OECD Guidelines for Multinational Enterprises’* (2008) 9 German Law Journal 1753, 1767

²¹⁸ OECD, OECD Annual Report on the Guidelines for Multinational Enterprises (n 196) 15

²¹⁹ *ibid* 16

²²⁰ OECD, the Guidelines (n 10) Procedural Guidance, 1. National Contact Points, 73 para 3

²²¹ *ibid*

²²² OECD, Guide for OECD National Contact Points on issuing Recommendations and Determinations, OECD Guidelines for Multinational Enterprises (2019) <<https://mneguidelines.oecd.org/Guide-for-National-Contact-Points-on-Recommendations-and-Determinations.pdf>>, 5, accessed 19 August 2019

²²³ *ibid* 6

According to the OECD's report covering the period 2011-2018 the NCPs have issued much more recommendations on how to improve the conduct of an enterprise to meet the standards of the Guidelines than they have issued determinations on the non-observance of the Guidelines. Out of the 48 NCPs put in place 40 have drafted rules of procedures according to which they handle specific instances. According to the OECD, report 33 of these 40 NCPs (83%) has included giving recommendations on their rules of procedure. Only 9 (23%) of the NCPs have included issuing determinations in their rules of procedure. According to OECD 91 out of 211 closed cases since 2011 have included a recommendation as to only 37 out of 211 cases included a determination on the enterprises observance of the Guidelines.²²⁴

One of the biggest concern raised on the NCPs work in specific instances are the refusal of some companies to cooperate in the process.²²⁵ Looking at the statistics provided it is clear that the determination is a less popular tool for the NCPs. According to the OECD Watch State of Remedy report, providing the victims of a breach of their rights under the Guidelines with a determination of a wrongful conduct by the enterprise would count as a "measure of remedy."²²⁶ The threat of being publicly "named and shamed" would also play a crucial part in accomplishing real discussion and real actions from the side of the enterprise to take part in the NCP procedure and comply with the guidelines. Currently, according to the OECD Watch "governments should require NCPs to issue determinations of non-compliance or compliance with the Guidelines, as a measure to encourage companies to implement the Guidelines' recommendations and participate meaningfully in the specific instance process."²²⁷ Currently, when the majority of the NCPs do not provide their own determinations on the non-compliance of the Guidelines in the case of failing mediation the status of the victim stays the same as before the beginning of the NCP procedure. As the UN Guiding principles are founded on the notion of providing remedy, the Guidelines as an implementation tool for said principles should include actual mechanisms of remedy.

According John Evans and Kristine Drew, the best performing NCPs play two roles: they offer good offices to resolve the specific instance at hand and when the enterprise is not

²²⁴ *ibid* 7-12

²²⁵ John Evans and Kristine Drew (n 171) 135

²²⁶ OECD Watch, State of the Remedy 2018 (n 195) 2

²²⁷ *ibid* 14

willing to cooperate it can provide a determination on the non-compliance of the Guidelines. A mediation process cannot function without a possibility of negative consequences.²²⁸ According to OECD Watch, statistics out of all the cases filed by NGOs and communities from 2000 to 2017 there were 31 cases that resulted in an agreement between parties, 22 (73%) were facilitated by NCPs that make determinations on non-compliance.²²⁹

According to the OECD Commentary on the Procedural Guidance “If the NCP makes recommendations to the parties, it may be appropriate under specific circumstances for the NCP to follow-up with the parties on their response to these recommendations.”²³⁰ The OECD’s Annual Report on the Guidelines 2018 concluded, “In 2018, the NCPs of Austria, Belgium, Canada, Denmark, France, the Netherlands, Spain, Switzerland and the United Kingdom issued follow-up statements relating to 12 specific instances. In addition, plans for follow up or monitoring of recommendations was included in final statements for 10 out of 13 concluded specific instances (77%). The rate of references to follow-up in final statements doubled from that reported in 2017 (35%)”.²³¹ This information is encouraging, yet, there is no information on the amount of follow-up procedures conducted by the NCPs so far, although it is encouraging that the NCPs seem to have higher interest in conducting monitoring on whether or not the enterprises actually improve their actions in accordance with the recommendations.

The statements given by the NCPs in the conclusion of the specific instance can have somewhat a role of a precedent. According to Karin Buhmann, the NCP statements have relevance in the work of OECD committees and can become precedents through OECD decisions, the statements can offer guidance to enterprises, and NCPs faced with similar questions.²³² Therefore, even though the determination on the observance or non-observance of an enterprise adds a reputational risk to the enterprise’s conduct, the recommendations can also have a significant impact on the NCP practice.

By moving towards all NCPs committing to use the tools such as determinations to provide remedy for the victims the specific instance procedure would increase its

²²⁸ John Evans and Kristine Drew (n 171) 135

²²⁹ OECD Watch, the State of Remedy 2018 (n 195) 12

²³⁰ OECD, the Guidelines (n 10) Commentary on the implementation, 85 para 36

²³¹ OECD, Annual Report on the Guidelines (n 196) 25

²³² Karin Buhmann (n 187) 397

effectiveness. In the OECD Annual Report 2018 two specific instances concluded, no mediation was established as the enterprises in question were not willing to participate in the NCP procedures.²³³ Even though the number seems small, it means that those NCPs lack in effectiveness. The two cases were from the NCPs of Brazil and Argentina, neither of which have a reference to issuing determinations in their rules of procedure.²³⁴

Even though the changes made in the Guidelines in 2011 has increased the possibilities for NCPs to handle specific instances and especially human rights complaints through to the adoption of the human rights chapter, the recent reports from the OECD and the OECD Watch have shown a decrease in the success rate of the NCP mediation procedures. According to the OECD Watch's State of Remedy 2018 "just four (36%) of the cases that went to mediation last year reached some kind of agreement.... Only 11 out of the 34 National Contact Point (NCP) cases concluded in 2018 even made it to the stage of mediation in the first place, with the rest being rejected outright by NCPs."²³⁵ According to OECD's annual report on the guidelines the 36 % of the cases mediated is a substantial decrease from the 2017 mediation percent of 83%.²³⁶ It is safe to say that due to the positive changes made to the Guidelines in the 2011 the NCPs could have great potential to help victims of infringements of their rights to receive remedy. However due to both insufficient Organisation that lacks coherency and can face risks of impartiality it also lacks effectiveness of the specific instance system as a whole.

4.3 The impact of the Guidelines and the NCPs on Human Rights protection

After the 2011 review of the Guidelines the amount of human rights complaints planted in the NCPs has risen. The Human Rights chapter was the third cited chapter in the complaints, only being led by the general principles chapter and the labour rights chapter, which means that the review of the guidelines in 2011 was an important change concerning the work of the NCPs.²³⁷ Before the review the complaints concerning Human Rights were mostly concerning labour rights which also include certain human rights.

²³³ OECD Annual Report on the Guidelines (n 196) 20

²³⁴ OECD, Guide for OECD National Contact Points on issuing Recommendations and Determinations (n 215), 9, table 2

²³⁵ OECD Watch, The State of Remedy (n 195) 1

²³⁶ OECD, Annual Report on the OECD Guidelines (n 196) 8

²³⁷ *ibid* 32

After the addition of the Human Rights chapter the subject area of the specific instances has not only increased in numbers but diversified as well.²³⁸

According to most of the Human Rights instruments the victim of a Human Rights violation has a right to effective remedy.²³⁹ The UN Guiding Principles on Businesses and Human Rights that have been implemented in the OECD Guidelines chapter on Human Rights is founded on the notion of victim's access to effective remedy.²⁴⁰ It is primarily the state's responsibility to offer remedy to the victims. The States are sometimes not willing or capable of providing the remedy. Thus there is a responsibility gap that has been filled by international organizations. From these international organisations it is the OECD that has the best capacity to fill the remedy gap with the NCP mechanism.

However, as provided in the earlier chapter, the NCPs lack effectiveness. The NCPs can issue recommendations to multinational enterprises on how to change their conduct so that it is aligned with the Guidelines' standards. This can have a positive impact both on the enterprise that the complaint is about as well as set example to enterprises maybe facing the same issue. The cases handled in the NCPs can be also used in OECD working committees and other NCPs working on similar instances. As can be noted from the OECD statistics, the recommendations have increasingly been used in the NCP conclusions.

Determinations issued by the NCPs can also form at least a partial remedy to the victims of Human Rights violations. According to the UN General Assembly, remedy in form of satisfaction can include "verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations". Satisfaction can also include "an official declaration or a judicial decision restoring the dignity, the reputation

²³⁸ John Ruggie and Tamaryn Nelson (n 170) 13-14

²³⁹ See for example the European Convention on Human Rights and the Universal Declaration of Human Rights

²⁴⁰ "These Guiding Principles are grounded in recognition of: (a) States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms; (b) The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights; (c) The need for rights and obligations to be matched to appropriate and effective remedies when breached"

and the rights of the victim and of persons closely connected with the victim”.²⁴¹ However, depending on the magnitude of the Human Rights violations whether or not the mere recognition of the situation counts as effective remedy is disputable.

According to Karin Buhmann the due diligence standards are increasingly important to protection of Human Rights, as “even where remedy is available, its effectiveness to restore human rights harm is questionable.”²⁴² Hence, even more crucial than providing effective remedy for the victims of human rights violations is to conduct due diligence to prevent the violations from happening in the first place. The adoption of the principle of due diligence covering all areas of the Guidelines in 2011 was extremely important especially in the question of human rights. However, due diligence is an extremely complex matter and the instance that could clarify the expected corporate conduct on due diligence are the NCPs through their final statements.²⁴³

In May 2018 the OECD adopted the OECD Due Diligence Guidance for responsible business conduct to “provide practical support to enterprises on the implementation of the OECD Guidelines for Multinational Enterprises by providing plain language explanations of its due diligence recommendations and associated provision”.²⁴⁴ As the guidance is quite recent its impact probably does not show in the statistics of the year 2018. However, if the enterprises begin to implement the guidance in their working plans it can have a positive change in the specific instance statistics. The best resolutions on the social impacts on company conducts can be reached, if the enterprises conduct thorough due diligence when doing business.

4.4 How to improve the effectiveness of the OECD Guidelines?

4.4.1 Peer reviews and awareness raising

According to the Commentary on the Implementation Procedures of the OECD, Guidelines for Multinational Enterprises should engage in peer learning. The paragraph

²⁴¹ UN General Assembly, A/RES/60/147, Resolution adopted by the General Assembly on 16 December 2000, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, IX Reparation for harm suffered, 22. Satisfaction

²⁴² Karin Buhmann (n 187) 396

²⁴³ *ibid* 409

²⁴⁴ OECD, Due Diligence Guidance for Responsible Business Conduct (2018) <<http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>>, accessed 18 August 2019

19 of the commentary States that the NCPs are: “encouraged to engage in horizontal, thematic peer reviews and voluntary NCP peer evaluations. Such peer learning can be carried out through meetings at the OECD or through direct co-operation between NCPs.”²⁴⁵

As can be noticed from the PISA reviews, the peer reviews conducted every three years on national educational systems have positive results on increasing reforms on national educational policies worldwide. However, the same enthusiasm on conducting peer reviews has not yet reached the NCP work. There could be several reasons for this. The public awareness of OECD regulation on multinational enterprises is very limited, and the knowledge of the existence of the NCPs even more so. The economic interest of a state to improve their educational system and therefore increase the populations capability in the labour market is probably well beyond its interest in ensuring that their national enterprises conduct their actions abroad in accordance with the voluntary guidelines on social responsibility. Mandatory demands on enterprises and the governments has also received extensive resistance from business.²⁴⁶

Unlike with the PISA, peer reviews conducted on the NCPs are merely “highly encouraged” and therefore voluntary. There should be a precise peer review procedure for NCPs. far only a few national NCPs have participated in voluntary peer review procedures. In 2018 a voluntary peer review was concluded by Austria, Canada, Chile Germany and the United States.²⁴⁷ The voluntary peer review system can also lack in efficiency, as it is not likely that the worst performing NCPs would be willing to participate in the peer review procedure.²⁴⁸ According to John Ruggie and Tamaryn Nelson “promoting awareness of the Guidelines is a legal obligation undertaken by governments. Therefore, minimum performance standards for NCPs and peer learning from the innovators among them should become a procedural requirement”.²⁴⁹ The core criteria for the functional equivalence of the NCPs are visibility, accessibility,

²⁴⁵ OECD, The Guidelines (n 10) Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises 81 para 19

²⁴⁶ John Evans and Kristine Drew (n 171) 133

²⁴⁷ OECD, OECD Annual Report on MNE Guidelines (n 196) 48

²⁴⁸ John Evans and Kristine Drew (n 171) 139

²⁴⁹ John Ruggie and Tamaryn Nelson (n 170) 122

transparency and accountability.²⁵⁰ This respective criterion could be better met with engaging sufficiently in promoting the Guidelines and conducting peer reviews.

Yet, according to the OECD “at the June 2017 OECD Ministerial Council Meeting (MCM), governments committed to having fully functioning and adequately resourced National Contact Points, and to undertake a peer learning, capacity building exercise or a peer review by 2021, with a view to having all countries peer reviewed by 2023”.²⁵¹ This shows that there is willingness from the governments to improve the effectiveness of the Guidelines. If all the States adhered to the Guidelines will put in place policies to enhance corporate social responsibility even if only in the matter of succeeding in OECD peer reviews there is potential for both engagement of the enterprises because of tightened policy regulations from the government and the strengthening of the NCP system nationally.

One of the tasks of the NCPs is to inform and promote the Guidelines in accordance with the Procedural Guidance, which States that the NCP will: “1) Make the Guidelines known and available by appropriate means, including through on-line information, and in national languages. Prospective investors (inward and outward) should be informed about the Guidelines, as appropriate. 2) Raise awareness of the Guidelines and their implementation procedures, including through co-operation, as appropriate, with the business community, worker Organisations, other non-governmental Organisations, and the interested public.”²⁵² According to an OECD Report between the years 2000 and 2015 there were 14 NCPs which have never received a complaint.²⁵³ This is more likely not because enterprises do not infringe the Guidelines and more likely due to the fact that the NCPs are “invisible or unresponsive to the possible complainants.”²⁵⁴

The NCPs should engage more in the promotional work concerning the NCP procedures to guarantee that the complaint mechanism is accessible to possible complainants. At the same time the strengthening of the peer review procedure so that it is an actual

²⁵⁰ OECD, the Guidelines (10), Procedural Guidance, 79

²⁵¹ OECD, The Website for National Contact Points, ‘*National Contact Point peer reviews*’, <<http://mneguidelines.oecd.org/ncppeerreviews.htm>>, accessed 18 September 2019

²⁵² OECD, the Guidelines (n 10), Procedural Guidance, 72 B paras 1-3

²⁵³ OECD, Implementing the OECD Guidelines for Multinational Enterprises: The National Contact Points from 2000 to 2015 <<https://mneguidelines.oecd.org/OECD-report-15-years-National-Contact-Points.pdf>> at 40, accessed 19 September 2019

²⁵⁴ John Ruggie and Tamaryn Nelson (n 170) 122

requirement for governments would enable NCPs to learn from one another on how to handle specific instances and how to conduct the promoting of the Guidelines and the NCP procedure. Mandatory peer reviews would not only put a peer pressure on national NCPs to succeed above their peers but it would also increase the coherency of the NCPs work. The result of successful OECD soft law (and the aim of it) is to systemize national policies in specific policy-fields. The coherency in NCP work would also increase the legitimacy and the authority of the NCPs.²⁵⁵

4.4.2 Effective cooperation and sanctions on non-compliance

Another way to strengthen the effectiveness of the Guidelines and the authority of the NCPs is through state actions. According to Ruggie and Nelson “with one single exception, no government has publicly stated that non-cooperation by a company with an NCP or a negative finding against a company will have any material consequences imposed by a government”²⁵⁶. This referring to Canadian government’s strategy to withdraw its support for foreign markets when a corporation fails to embody corporate social responsibility or does not participate in the specific instance-procedure.²⁵⁷

As the NCPs are usually located within government administrations, the NCPs would have the potential to use real leverage towards the enterprises that do not comply with the Guidelines. This could be for example “the staying of import or export licenses, the withholding of government subsidies and aid, or disqualification from government procurement”. If the NCPs were to use this kind of leverage the influence they would have on corporate conduct would be more broad than when only tackling single instances with mediation that has no enforcement methods and no monitoring after the mediation.²⁵⁸

The State Action does not only have to be in the form of a sanction. States could cooperate with the enterprise to establish the best policies and practices.²⁵⁹ As noted earlier the NCP recommendations can have a positive impact on the corporate conduct for both the

²⁵⁵ Shelley Marshall, *OECD National Contact Points - Better Navigating Conflict to Provide Remedy to Vulnerable Communities, Corporate Accountability Research* (2017) <<https://www.oecdwatch.org/wp-content/uploads/sites/8/2017/05/OECD-National-Contact-Points.pdf>>, 7, accessed 19 August 2019

²⁵⁶ John Ruggie and Tamaryn Nelson (n 170) 122

²⁵⁷ *ibid*

²⁵⁸ Shelley Marshall (n 249) 6

²⁵⁹ John Ruggie, ‘10th OECD Roundtable On Corporate Responsibility – Updating the Guidelines for Multinational Enterprises’, Discussion Paper, Paris 2010 <<http://www.oecd.org/daf/inv/mne/45545887.pdf>>, 7, accessed 19 September 2019

enterprise taking part in the NCP procedure as well as other enterprises. However, these recommendations should also include a follow-up mechanism to ensure that the enterprise follows the recommendations given. Despite this, when the enterprise fails to cooperate in the NCP procedure there has to be a real negative consequence, be it in the form of a determination on the non-compliance of the Guidelines which is made publicly available and the possibility of losing the financial support of the Government for a certain amount of time.²⁶⁰ The issue with the NCPs statement on the non-compliance of an enterprise is that it is not a requirement for the NCPs and not all of the NCPs have included this possibility in their Rules of Procedure of the NCPs. The possibility of the NCP to give a final statement recognising the possible misconduct of the enterprise would increase the enterprise's willingness to cooperate in the specific instance procedure leading to a higher success rate of NCP mediations.

One way to improve the effectiveness of the Guidelines would be to strengthen the NCPs authority through OECD policies. According to OECD "coordination on specific instances has been identified by NCPs as an ongoing challenge. Specific instances being filed with NCPs are increasing complex and the nature of global business operations, supply chains, investment chains, and corporate structures today has meant that identifying the lead NCP can be challenging. Additionally, diversity across NCPs in terms of their level of functionality as well as variation in procedural rules for handling specific instances has meant that there has not been a consistent approach to coordination".²⁶¹ In 2018 OECD began developing a paper to answer the NCP challenges.²⁶² This will hopefully lead to more sufficient coordination between NCPs. Yet, it is also necessary that governments are engaging in the actual practical coordination with providing the NCPs with appropriate amount of resources and staff, which has proved to be an issue with the functioning of the NCPs in conducting mediation procedures.²⁶³

²⁶⁰ *ibid*, also John Evans and Kristine Drew (n 171) 135 on the final statement of the NCP

²⁶¹ OECD, The Annual Report on the Guidelines (n 196) 24

²⁶² *ibid*

²⁶³ *ibid* 15

5 Conclusions

The globalisation has positively affected the global economy, trade and labour possibilities. It has also caused a change in the global governance, where the sovereign States are no longer the sole actors in the field of international law. However, the international law has not evolved in the same pace as the world. In the power play with the States are also international organisations and private entities such as corporations, sometimes larger in resources than of the States where they operate.

This has caused a governance gap in the field of human rights. Numerous Non-State actors have the power to affect negatively the human rights of the individuals in their areas of operation. Even though it would be the state's responsibility to protect the individuals by establishing legislation, enforcing it and providing remedy the unfortunate fact is that some States are not able or not willing to do it. The extraterritorial legislation cannot provide satisfactory results in protecting human rights due to politics and complex diplomatic relations to intervene in another States' internal affairs, as well as the fact that it is not always clear under which jurisdiction the case at hand would actually belong. Even more so the international law has not recognised the responsibility to use extraterritorial jurisdiction, it only States that it is not forbidden for a state to conduct in extraterritorial jurisdiction.

The better option to regulate the issues that are between jurisdictions setting is cooperation through soft law initiatives. The prime example of being able to *de facto* change national policies to be in accordance with international public interests is the OECD. It has established itself as an organisation that can influence the shared values of its Member and Non-Member States through identifications and operating through actors' identifications as well as actually following-up on the together agreed policies. The OECD has authority over national policy-makers through its reputation as an independent and unbiased knowledge-producing organisation. The statistics and reports of the organisation have established a certain authority where there is no need to justify the correctness of the OECD information. OECD's initiatives present a best practice in the policy-field specific and States want to aspire these goals. OECD is capable to put peer pressure on its members through peer reviews that it conducts. These peer reviews have proved to have real regulatory value as they do in fact shape the actions of the

participating States. It is therefore safe to say that the OECD soft law has, despite of not being binding, a real regulatory effect.

The OECD's Guidelines are the OECD's answer on the responsibility gap concerning business and human rights. What makes the guidelines a unique mechanism for corporate social responsibility are the NCPs that are mandated to promote the Guidelines and handle specific instances. The 2011 review of the Guidelines included very important changes for human rights protection. First of all it is clear, that the States are responsible for establishing appropriate legislation and policies to protect individuals. Despite this a proper protection of human rights needs the actions of multinational enterprises. Therefore, the renewed human rights chapter of the Guidelines is important in engaging enterprises in human rights protection. It is crucial that the enterprises conduct human rights due diligence throughout their operations in host States, whether the state is willing or capable to establish regulation sufficient to guarantee the fulfilment of human rights in its territory or not. In addition, extending the corporate responsibility to subsidiaries has a great value in advancing the human rights in multinational enterprise's areas of operation.

The NCPs that are implemented in all adhering States are responsible for promoting the Guidelines and handling specific instances. The NCPs have real potential to handle human rights cases as they can offer a valuable discussion forum for the complainant and the enterprise accused and provide recommendations on how to improve the corporate conduct to be in accordance with the Guidelines. However, as the NCP procedure is voluntary for an enterprise, there is no material sanctions from the part of the OECD when the enterprise does not participate in the process. Even though the NCPs are capable to provide determinations on the enterprise's non-compliance, a minority of States have mandated their NCP to do so in the NCPs Rules of Procedure. In practice, including the possibility of giving a statement on corporate non-compliance in the Rules of Procedure has showed evidence on being an efficient leverage to engage enterprises in the mediation procedure. The NCP determination on non-compliance can also serve as a form of remedy for the victim of the human rights violation.

The means to improve the Guidelines include engaging the States more into the implementation of the guidelines. The peer review procedure has established itself as a

sufficient motivator for reforms in national policies. However, the peer review procedure on the NCP system has only included in the procedural guidance as voluntary. The government engagement in establishing a functional system of corporate conduct is crucial. This also means more enforcement mechanisms to the NCP procedures, such as using leverage to make enterprises obey the guidelines and adding the possibility for the NCP to provide determinations on corporate breaches of the Guidelines. Efficient cooperation amongst States and the OECD is needed to protect individuals from wrongful corporate conduct.